North Dakota Law Review

Volume 64 | Number 3 Article 1

1988

Smoking in Public Places: Living with a Dying Custom

Larry Kraft

SMOKING IN PUBLIC PLACES: LIVING WITH A DYING CUSTOM

LARRY KRAFT*

INTRODUCTION

Smoking harms smokers. That fact is universally accepted and was established at least a century ago.[1] Within the last two years

---

* Professor of Law, University of North Dakota School of Law; J.D., University of North Dakota, 1964; LL.M., University of Texas, 1970.

1. *See* Austin v. State, 101 Tenn. 563, 48 S.W. 305 (1898). *Austin* represents an early state supreme court decision wherein smoking was recognized as a harmful vice. The Tennessee Supreme Court, having been called upon to decide whether a total ban on the sale of cigarettes was lawful, stated:

> Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes; yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts, which, by human observation and experience, have become well and generally known to be true. . . . It is a part of the history of the organization of the volunteer army in the United States during the present year that large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and that, among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps, every other, reason. It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea, and alone for the protection of the people of the state from an unmitigated evil . . . .

Id. at ———, 48 S.W. at 306. Upon making these observations, the court concluded that "cigarettes have no redeeming qualities." *Id.* at ———, 48 S.W. at 308.

On appeal, the United States Supreme Court added:

> [We would] be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in [cigarettes'] deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the young of both sexes.

Austin v. Tennessee, 179 U.S. 343, 348 (1900).

See also 134 CONG. REC. E2290 (daily ed. July 7, 1988) (statements by Representative Waxman on whether society is losing the battle against cancer). Representative Waxman stated:

> It would be difficult to exaggerate the enormous negative impact on tobacco on human health. The position that tobacco use, particularly cigarette smoking, is the major cause of cancer mortality is one supported by the U.S. Public Health Service, the Surgeon General, the Royal College of Physicians in the United Kingdom (UK), and the World Health Organizations. Every independent scientific body that has objectively examined this question has reached the same conclusion; and a substantial body of evidence, consisting of several thousand scientific studies, allows the conclusion that smoking is a major cause not only of lung cancer but of cancer of the larynx, oral cavity, pharynx, and esophagus, and contributes to cancers of the bladder, kidney, and pancreas because tobacco car-

the Surgeon General reported[2] as fact that smoking also harms nonsmokers.[3] That report, supported by over 300 pages of scientific evidence,[4] is the impetus for what could be a massive wave of nonsmokers' rights cases.

The leading edge of that wave appears to have hit. The Washington Supreme Court recently recognized a nonsmoker's right to sue her employer for negligently allowing environmental tobacco smoke (ETS)[5] in her workplace,[6] and a United States district court held that it may be cruel and unusual punishment to make a non-

---

cinogens are absorbed into the blood stream and are transported to multiple remote sites. An association between smoking and cancer of other sites have also been observed but a causal role has yet to be established.

Id. at E2295.

See also Crist & Majoras, *The "New" Wave in Smoking and Health Litigation — Is Anything Really So New?*, 54 TENN. L. REV. 551, 554 (1987) (discussing some of the earliest efforts to warn the public of the perceived health hazards of smoking).

2. U.S. DEP'T OF HEALTH, EDUC. & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL (1986) [hereinafter 1986 SURGEON GENERAL'S REPORT].

3. *See id.* at 7 (cigarette smoke breathed in by nonsmokers may cause disease, including lung cancer, to arise in the involuntary smoker).

4. Much of the research contained in the *1986 Surgeon General's Report* focused on the harmful effects of smoking on smokers. Discussing this research and its value to a study of the harmful effects of smoke on nonsmokers, the Surgeon General wrote:

> Over thirty years of research have conclusively established cigarette smoke as a carcinogen. . . . It is rare to have such detailed exposure data or human epidemiologic studies on disease occurrence when attempting to evaluate the risk of low-dose exposure to an agent with established toxicity at higher levels of exposure.

Id. at x.

5. ETS results from the combination of sidestream smoke and the fraction of exhaled mainstream smoke not retained by the smoker. *Id.* at 7.

> The comparison of the chemical composition of the smoke inhaled by active smokers with that inhaled by involuntary smokers suggests that the toxic and carcinogenic effects are qualitatively similar, a similarity that is not too surprising because both mainstream smoke and environmental tobacco smoke result from the combustion of tobacco. Individual mainstream smoke constituents, with appropriate testing, have usually been found in sidestream smoke as well. However, differences between sidestream smoke and mainstream smoke have been well documented. The temperature of combustion during sidestream smoke formation is lower than during mainstream smoke formation. As a result, greater amounts of many of the organic constituents of smoke, including some carcinogens, are generated when tobacco burns and forms sidestream smoke than when mainstream smoke is produced. For example, in contrast with mainstream smoke, sidestream smoke contains greater amounts of ammonia, benzene, carbon monoxide, nicotine, and the carcinogens 2-napthylamine, 4-aminobiphenyl, N-nitrosamine, benz[a]anthracene, and benzo-pyrene per milligram of tobacco burned. Although only limited bioassay data comparing mainstream smoke and sidestream smoke are available, one study has suggested that sidestream smoke may be more carcinogenic.

Id. at 7-8.

6. McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 356 (1988) (court found that the State owed an affirmative duty to provide its workers with a safe place to work). For a further discussion of McCarthy, see *infra* notes 54-58, and accompanying text.

smoker prisoner share a cell with a smoker.[7] Both courts accepted the Surgeon General's conclusion that ETS harms nonsmokers,[8] thereby eliminating for these plaintiffs a formidable challenge faced by some earlier nonsmokers' rights plaintiffs who had to prove that it did.[9]

These courts also placed emphasis on the legislative support for nonsmokers' rights that has emerged in the last few years.[10] That support began growing in the early 1970s, leading to the passage of the first clean air act in 1976.[11] Today, clean air acts are commonplace,[12] fueling a growing trend toward greater protection for nonsmokers, especially in private and public places open to the public, and at worksites.[13]

Significantly, the legislative support has developed in the face of strong smoker resistance, promoted at least in part by tobacco

---

7. Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1988).

8. *See McCarthy*, 110 Wash. 2d at ——, 759 P.2d at 355 (quoting the 1986 Surgeon General's Report for the health effects of involuntary smoking); *Avery*, 695 F. Supp. at 638 n.9 (discussing the inapplicability of prior cases dealing with cruel and unusual punishment for exposure to tobacco smoke because they predated the 1986 Surgeon General's Report).

9. As an example of the burden of proof placed on nonsmokers prior to the *1986 Surgeon General's Report*, consider the following comments:

> The lesson from *Gordon* [Gordon v. Raven, discussed at *infra* notes 59-63 and accompanying text] is clear. To prevail on a common law theory, a nonsmoking plaintiff must demonstrate that tobacco smoke is harmful both to himself and to nonsmokers in general. *The importance of an extensive, persuasive factual foundation to prove the deleterious harm from tobacco smoke cannot be overstated.*

Paolella, *The Legal Rights of Nonsmokers in the Workplace*, 10 U. PUGET SOUND L. REV. 591, 600 (emphasis added). However, after *McCarthy* and *Avery*, the burden of proving harm has been eliminated. As an example, consider the following comments by the court in *Avery*:

> Three courts have addressed the constitutionality of exposure to ETS in non-Eighth Amendment contexts. *See Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983) [court of appeals upheld the district court's dismissal of plaintiff's complaint which alleged plaintiff had a federal right to a smoke-free workplace]; *Federal Employees for Non-Smokers Rights (FENSR) v. United States*, 446 F. Supp. 181 (D.D.C. 1978) [district court granted defendant's request for summary judgment as to constitutional issues concluding that while plaintiffs' concerns were worthy of attention, they should not be elevated to a constitutional level]; *Gasper v. Louisiana Stadium and Exposition Dist.*, 418 F. Supp. 716 (E.D. La. 1976), *aff'd* 577 F.2d 897 (5th Cir. 1978) [district court refused to consider a complaint based on the Civil Rights Act (87) which sought to enjoin smoking in the Louisiana Superdome while events were taking place]. Although the court in each case declined to hold that exposure to ETS was violative of the United States Constitution, *the decisions predate the 1986 Surgeon General's Report* and therefore are not dispositive of the instant question.

Id. at 638 n.9 (emphasis and parentheticals added).

10. *McCarthy*, 110 Wash. 2d at ———, 759 P.2d at 355; *Avery*, 695 F. Supp. at 640.

11. 1975 MINN. LAWS 211 (codified as amended at MINN. STAT. ANN. §§ 144.411-.417 (West 1988)).

12. *See* Note, *An Overview of Current Tobacco Litigation and Legislation*, 8 U. BRIDGEPORT L. REV. 133, 175-182 (1987) (providing a comprehensive listing of state legislative enactments which restrict or ban smoking in public and private places).

13. *Id.*

interests.[14] However, after the Surgeon General's 1988 Report

14. Philip Morris, Inc. has been heavily involved in promoting "smokers' rights." It finances a wide variety of so-called smokers' rights propaganda material. There are books — *e.g.*, TOLLISON, CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE (1988); magazines — *e.g.*, THE PHILIP MORRIS MAGAZINE; and newsletters — *e.g.*, THE NORTH DAKOTA SMOKER. The power of the entire tobacco lobby is tremendous. One would expect the congressional representatives from the tobacco growing states to work for the tobacco industry. But, others too seem under the industry's spell. *See, e.g.*, Corn, *Bob Dole and The Tobacco Connection*, THE NATION, March 28, 1987, at 1:

> Where there's smoke, there's Bob Dole. . . . During the 1985 and 1986 budget negotiations in the Senate, Dole . . . fought for tobacco interests in the Finance Committee. . . . Dole's biggest move for the tobacco lobby came when the Finance Committee took up the budget reconciliation bill in 1985. . . . Dole won it all. By voice vote the committee included in its deficit reduction bill Dole's low tax on chewing tobacco and snuff, an extension of the 16-cent excise tax [instead of 32-cent] and his and Helms' $1 billion tobacco industry bailout. . . . In 1985 and 1986, PAC contributors to Dole's campaign coffers included Philip Morris, . . . R.J. Reynolds, Brown and Williamson, . . . Lorillard . . . and the Tobacco Institute. Four of those PACs donated to Campaign America, which dispenses money to candidates Dole supports. According to his Senate financial disclosure forms, Dole receives honorariums for speeches made to tobacco companies.

Id. at 1. *See also*, Glass, *Powerful Lobbyists Build Smoke Screen for Tobacco Firms*, Austin American-Statesman, May 26, 1985, at J6, col. 1: "Members of Congress earn slightly less than $73,000 each year. . . . [They] are allowed to retain their speaking fees, up to 30 percent of their salaries. . . . [T]he Tobacco Institute ranks as the top giver among the groups that paid members of Congress to deliver speeches last year. . . ." *Id. But see, Tough Times to Tobacco Lobby*, U.S. NEWS & WORLD REPORT, Feb. 23, 1987, at 17. Reporting on the diminishing influence of the tobacco lobby, the article states: "As Representative Thomas Bliley, a Republican who represents the tobacco capital of Richmond, puts it: 'We keep circling the wagons, but the circle keeps getting smaller'." *Id.*

The influence of the tobacco industry is not new. Consider this description of its importance in 1962:

> The tobacco coalition included not only the industry itself, but millions of smokers who annually consumed about 495 billion cigarettes and other tobacco products worth nearly $8 billion. The beneficiaries of that money were the manufacturers, ad agencies, mass media, farmers, and shopkeepers. By 1962, tobacco ranked fourth in overall value of cash crops, grossing American farmers $1.3 billion. Tobacco was third in the dollar value of agricultural exports. Over 700,000 American farm families were . . . employed in different phases of tobacco agriculture. Five thousand wholesalers and 700,000 retailers were involved in the distribution and marketing of cigarettes.

Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 644-45 (1987) (citations omitted).

As early as 1900, the United States Supreme Court in *Austin v. Tennessee* discussed the value to America of the tobacco industry in these words:

> From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit, or other articles, the use of which is a menace to the health of the entire community.

Austin v. Tennessee, 179 U.S. 343, 345 (1900).

The Court further noted: "Nor can we deny to the legislature the power to impose restrictions upon the sale of noxious or poisonous drugs, such as opium and other similar articles, extremely valuable as medicines, but equally baneful to the habitual user." *Id.* at 348.

In discussing the financial effect of the tobacco industry on the federal government, the Court recognized that "the number of cigarettes manufactured in the United States during

concluded that nicotine is a narcotic as addictive as cocaine and heroin,[15] the arguments of smokers are now especially unconvincing and are merely viewed as the specious reasoning of addicts who are more to be pitied than pilloried.[16]

When the wave of nonsmokers' rights cases hits it will be the third wave of tobacco-induced lawsuits.[17] This wave will be

---

the year 1899 were . . . 2,805,130,737 . . . , on which the government collected a tax of . . . $4,213,215.25." *Id.* at 368.

In light of these attributes of tobacco and the tobacco industry, the dissent stated:

> Suppose the legislatures of all the other states should become possessed of the idea that the use of tobacco was injurious, and prohibit the importation and sale thereof. . . . Could not Tennessee rightfully contend that it was a matter affecting one of its large industries and which was likely to be destroyed by such adverse legislation?

Id. at 375 (Brewer, J., Shiras, J., Peekham, J., Fuller, C.J., dissenting).

15. U.S. DEP'T OF HEALTH, EDUC. & HUMAN SERVS., THE HEALTH CONSEQUENCES OF SMOKING, NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL 14 (1988) [hereinafter 1988 SURGEON GENERAL'S REPORT]. The North Dakota State Health Department recognized nicotine addiction in its 1986 report. NORTH DAKOTA STATE DEP'T OF HEALTH, TOBACCO, HEALTH AND THE BOTTOM LINE 50 (1986). Designed to promote efforts to reduce tobacco utilization in North Dakota, the report is a comprehensive analysis of tobacco use and its consequences in North Dakota, and provides specific recommendations for reducing deaths associated with tobacco use.

16. "Tobacco is suicide, but most of the pleasures of life are suicide . . . , yet we wonder that people should be so much concerned about it as to form and maintain a league to combat the smoking habit. It seems so largely a personal matter." Crist & Majoras, *supra* note 1, at 556 n.35. *See also You Antismokers Make Me Sick!*, Grand Forks Herald, March 30, 1988, at 4A, col. 3 (letter to the editor):

> I am mad — and I, and millions of other smokers in this country, have had it! I have paid for the right to smoke! I have smoked for 50 years and I have paid taxes on every package of cigarettes I have smoked. Nonsmokers have had a free ride long enough. The idea that a few whiffs of tobacco . . . would give anyone cancer is ludicrous. Congress has just passed a law protecting the rights of AIDS victims. How about the rights of smokers!

Id.

17. The first two waves of tobacco-related lawsuits were those brought by smokers and their survivors against tobacco companies. The first wave reached the courts in the late 1950s (for citations to the leading cases, see Stein, *supra* note 14, at 631-32) and was well on its way through the court system when in 1962 a rather curious development defeated these plaintiffs. That development was the formulation by the American Law Institute (ALI) of the doctrine of strict liability, which, with revisions in 1964, became section 402A of the Restatement (Second) of Torts. Section 402A provides:

> § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

The ALI's purpose was to restate existing law when its reporter, Dean Prosser, and his committee of advisors, including Chief Justice Roger J. Traynor of the Supreme Court of

broader than its predecessors which pitted plaintiff smokers against defendant tobacco product producers.[18] Tobacco produ-

---

California, proposed 402A. But where was the existing law behind 402A? There was, of course, *Greenman v. Yuba Power Products* decided in 1963 by the California Supreme Court, opinion by Justice Traynor (action brought for damages against the retailer and manufacturer of a combination power tool claiming plaintiff suffered serious injuries as the result of defendants' breaches of warranties and negligence). 59 Cal. 2d 57, 27 Cal. Rptr. 687, 377 P.2d 897 (1962). Dean Prosser later commented on *Greenman*: "The first case to consider this approach [strict liability in tort] was a 1962 California case, *Greenman v. Yuba Power Prods. Inc.*, Justice Traynor's case, along with the *Henningsen* case [Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A.2d 69 (1960)], one of the twin landmarks among these decisions." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 803 (1966). Did Justice Traynor look for this opportunity to create law so that it could be *restated*, and therefore become universally accepted law?

Prosser, however, took credit for being the first to propose the strict liability idea. *Id.* at 802 (citing Prosser, *The Assault Upon the Citidel*, 69 YALE L.J. 1099 (1960)). And, while 402A probably was good theory, it should have had the opportunity to develop through the adversary process. *See* Kraft, *The North Dakota Equity for Tortfeasors Struggle: Judicial Action vs. Legislative Over-Reaction*, 56 N.D.L. REV. 67 (1980).

Why was Prosser in such a hurry to get 402A accepted? Would tobacco products have been specifically excluded from 402A if he had not been so precipitous? *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965) ("Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful"). Was there concern about tobacco industry pressure? Certainly 402A was not so fully developed that a few more committee meetings devoted to it would have been wasteful. In fact, 23 years and thousands of lawsuits later, the retrospective common law development of the strict liability in torts concept is not yet complete. Although in the process of coping with puberty, 402A spawned a litigation explosion, bankrupted a number of legitimate businesses, and was a major player in bringing about the so-called "torts crisis."

A reporter's ego and his well deserved reputation as a scholar probably explains how 402A snaked its way past the American Law Institute. But the relatives of the millions of Americans whose deaths were caused by tobacco, a hazardous product that is absolutely devoid of social utility, deserve to know why that product was given such favorable treatment. The reason given by Dean Wade, another member of Prosser's 1962 Committee of Advisers, falls short:

> If a danger in the use of a particular product is a matter of common knowledge and the public is fully aware of it and still freely buys the product, then the product may well be found to be duly safe. Two common products where this may well be true today, for example, are liquor and the danger of alcoholism, and *cigarettes and the danger of lung cancer.* General knowledge and common expectations may well be controlling, *especially if the danger is confined to the user, who knowingly subjects himself to it*, and the dangerous condition cannot be avoided.

Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 830 (1973) (emphasis added).

The second wave of smokers versus tobacco company litigation came in the 1980s. For a discussion of the cause of that wave, see Stein, *supra* note 14, at 646-56. For a discussion of how preemption tamed the wave, see Crist & Majoras, *supra* note 1, at 566-82.

18. For a discussion of tobacco litigation, see 3 *Mealey's Litigation Reports: Tobacco* (Mealey Pub. Inc.) 1 (Feb. 1988); Boulton, *Tobacco Under Fire: Developments in Judicial Response To Cigarette Smoking Industries*, 36 CATH. U.L. REV. 643 (1987); Garner, *Cigarette Dependency on a Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423 (1980); Levin, *The Liability of Tobacco Companies — Should Their Ashes Be Kicked?* 29 ARIZ. L. REV. 195 (1987); McElvaine, *Liability of Cigarette Manufacturers for Smoking Induced Illnesses and Deaths*, 18 RUTGERS L.J. 165 (1986); McLeod, *The Great American Smokeout: Holding Cigarette Manufacturers Liable for Failing to Provide Adequate Warnings of the Hazards of Smoking*, 27 B.C.L. REV. 1033 (1986); McNamara, *Smokeless Tobacco: Defective Marketing Creates A New Toxic Tort*, 21 TULSA L.J. 499 (1986); Reaves, *Strict Products Liability on the Move: Cigarette Manufacturers May Soon Feel the Heat*, 23 SAN DIEGO L. REV. 1137 (1986); Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POL'Y & L. 277 (1980); Stein, *supra*

cers will also be the targets of nonsmoker lawsuits,[19] but so will other defendants, such as employers who permit smoking in the workplace, managers of private places open to the public, and managers of public places open to the public.[20]

CONSENT BY CUSTOM REVOKED

From its discovery in the 1600s until the early 20th Century, tobacco use was frowned upon because it was a vice — an "evil."[21]

---

note 14; *The First Amendment and Cigarette Advertising*, 256 J.A.M.A. 502 (1986); Note, *The Smouldering Issue in Cipollone v. Liggette Group, Inc.: Process Concerns in Determining Whether Cigarettes Are a Defectively Designed Product*, 73 CORNELL L. REV. 606 (1988); Note, *Plaintiff's Conduct As A Defense To Claims Against Cigarette Manufacturers*, 99 HARV. L. REV. 809 (1986); Note, *supra* note 12.

19. Innocent third parties who are harmed by ETS may have claims under section 402A of the Restatement (Second) of Torts. Moreover, their claims will not be hampered by assumption of risk and other defenses that have haunted smokers' claims. "Assumption of risk" is a term signifying that the plaintiff has voluntarily assumed a risk of harm arising from the negligent conduct of the defendant. RESTATEMENT (SECOND) OF TORTS § 496A (1965). Assumption of risk damages the plaintiff's chances of recovery. *Id.* Consider, for example, the claim of a young child who contracted a pulmonary disease because of ETS, or a child who, as a fetus, was injured by either its mother's voluntary smoking or her involuntary smoking.

A second type of nonsmoker versus tobacco company action arises out of fires caused by smokers. Nonsmokers injured in cigarette-caused fires have a strict liability claim against tobacco companies. *See* Garner, *Product Liability in Cigarette Caused Fires*, N.Y. ST. J. MED. 322, July 1985, at 322:

> [C]igarette manufacturers add citrates to the paper that make cigarettes burn even when they are not being smoked. In other words, there has been a conscious effort on the part of cigarette manufacturers to design cigarettes that will continue to burn without being smoked and will thereby ignite couches and beds when cigarettes are dropped. The safety of . . . innocent bystanders such as children in the neighboring apartment, must be factored into the design of the cigarette.

Id. at 322. *See also* Ranii, *Tobacco's Legal Road — Nonsmokers Get Fired Up*, THE NAT'L L.J., Apr. 9, 1984, at 1, col. 1:

> There . . . are "all kinds of other plaintiffs out there" who could be pursuing meritorious product liability claims against the tobacco companies — especially victims of fires ignited by cigarettes smoked by third parties. . . . [C]igarettes are "a clear case of a dangerously manufactured product" because they are "impregnated with chemicals to keep them burning." Cigarettes are the top cause of fire deaths in the country . . . .

Id. at 10, col. 3 (citations omitted).

Two cigarette-fire suits are in their early stages in New Jersey and Tennessee. *See* Cope, *Where There's Smoking. . .Attorneys Allege Tobacco-Industry Liability for Cigarette Fires*, 24 TRIAL 42 (1988). The tobacco industry is expected to spend millions defending them. *Id.* at 46.

One would hope this discussion will prompt the student who wrote the following to reconsider his position: "[S]trict liability against tobacco manufacturers is inappropriate because smokers harm [only] themselves. . . . [There is an] absence of proof of significant involuntary harm to third parties." Note, *The Manufacture and Distribution of Handguns As An Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 400 (1987).

20. Individual smokers, too, will be defendants. Unless they refrain from spewing poison at nonsmokers, they will be prime targets of nonsmokers' lawsuits. Moreover, no new law need develop. As society becomes more informed about the seriousness of the harm caused by contact with ETS, plaintiff nonsmokers will have several common-law torts available to them. *See infra* note 170.

21. *See* Austin v. State, 101 Tenn. 563, ———, 48 S.W. 305, 306 (1898) (unconditional

Few Americans used it.[22] But then Americans went on a tobacco smoking binge.[23] Everyone started doing it and doing it everywhere, creating an American custom which gave to the smoker consent to smoke at will.

Smokers can no longer count on that custom for consent. Smoking is again out of favor, but this time because tobacco is recognized as a harmful and addictive drug.[24] Consequently, the

---

prohibition on the sale of cigarettes was made to protect the people from an unmitigated evil); Crist & Majoras, *supra* note 1, at 554 (quoting JAMES I., COUNTERBLASTE TO TOBACCO (London 1604) *reprinted by* Da Capo Press (New York 1969) (original in Old English)) (describing smoking as "a custom loathsome to the eye, hateful to the nose, harmful to the brain, dangerous to the lungs"). *See also* 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 266-67:

> [C]igarette smoking has been the subject of restrictive legislation for nearly a century. Early legislation had two different rationales. The first, a relatively noncontroversial rationale, was the protection of the public from fire or other safety hazards, largely in the workplace.
>
> The second, more controversial motivation for early legislative action was a moral crusade against cigarettes. . . . Its goal was a total ban on cigarettes, which were blamed for social evils and physical ills, based largely on unfounded claims.

Id. at 266-67 (citations omitted).

The first concern pertaining to the fire and safety hazards associated with cigarettes should not be controversial in 1988, either. As one writer has noted:

> [C]igarettes cause fires which claim an estimated 2500 lives per year. About 800,000 cigarettes are smoked per minute in the U.S. With an estimated one in two million cigarettes starting a fire, a smoker's puffs result in flames once every three minutes. . . . [Fifty-six] percent of all fatal residential fires arise from smoking.

Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL. L. 317, 329 (1987).

22. Tobacco consumption in the United States at the turn of the century was less than 50 cigarettes per person a year, as compared with 3,986 per person per year in 1961. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF PUBLIC HEALTH SERVICE 26 (1964) [hereinafter 1964 SURGEON GENERAL'S REPORT].

23. *See* Cowell, *An Insurance Company Perspective on Smoking*, 85 N.Y. ST. J. MED., July 1985, at 307 (more than 50% of the adult men and over 30% of adult women in the U.S. smoked cigarettes in 1963).

24. *See* 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at i: ("Scientists in the field of drug addiction now agree that nicotine, the principal pharmacologic agent that is common to all forms of tobacco, is a powerfully addicting drug").

> Nicotine is a powerful pharmacologic agent that acts in a variety of ways at different sites in the body. After reaching the blood stream, nicotine enters the brain, interacts with specific receptors in brain tissue, and initiates metabolic and electrical activity in the brain. In addition, nicotine causes skeletal muscle relaxation and has cardiovascular and endocrine (i.e., hormonal) effects.

Id. at iv.

> This report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense as are drugs such as heroin and cocaine.

Id. at vi.

> Many smokers have quit on their own ("spontaneous remission") and some smokers smoke only occasionally. However, spontaneous remission and occasional use also occur with the illicit drugs of addiction, and in no way disqualify a drug from being classified as addicting. Most narcotics users, for example, never progress beyond occasional use, and of those who do, approximately 30 percent spontaneously remit.

number of Americans who smoke is steadily decreasing[25] and this pattern seems likely to continue.[26] In addition, now that the non-

---

Id. at v.

Only an addict could write the following letter:

> I . . . am a smoker who had lung cancer 15 years ago. I'm puffin' with one-half my right lung missing. . . . I've had several deaths in my family because of lung cancer. This cannot be blamed on heredity. It had to be cigarette smoke. . . . Guess I'll just keep puffin' and stay alive and relaxed with my cigarettes instead of Valium or some other tranquilizer, until the good Lord says, "I want you, not because you smoke, but because I found a place for you."

Grand Forks Herald, April 26, 1988, at 2A, col. 3 (letter to the editor).

Patrick Reynolds, grandson of tobacco magnate R.J. Reynolds, has recognized the harm caused by tobacco and has become an outspoken opponent of smoking. Reynolds speaks from personal experience. He remembers his father, R.J. Reynolds, Jr., as "a man lying on his back, sandbags on his chest to exercise his diaphragm, smoking cigarettes [and]. . . a man always short of breath, counting the time he had left to live." Anderson, *A New Leaf: A Tobacco Heir Rejects the Legacy*, Chicago Tribune, May 18, 1988, § 5 at 1, col. 2. Would any objective person suggest R.J. Reynolds, Jr., was not an addict?

25. The *1988 Surgeon General's Report* indicates that the popularity of cigarette smoking has declined significantly:

> An estimated 32.7 percent of men and 28.3 percent of women smoked cigarettes regularly in 1985. The overall prevalence of smoking in the United States decreased from 36.7 percent in 1976 (52.4 million adults) to 30.4 percent in 1985 (51.1 million adults).
>
> In 1985, the mean reported number of cigarettes smoked per day was 21.8 for male smokers and 18.1 for female smokers.
>
> Smoking is more common in lower socioeconomic categories (blue-collar workers or unemployed persons, less educated persons, and lower income groups) than in higher socioeconomic categories. For example, the prevalence of smoking in 1985 among persons without a high school diploma was 35.4 percent, compared with 16.5 percent among persons with postgraduate college education.

1988 SURGEON GENERAL'S REPORT, *supra* note 15, at 16. For a discussion of the social costs of smoking, see *infra* note 181 (report of the National Cancer Institute indicating that smoking related deaths due to cancer are on the rise as the result of a resurgence in smoking's popularity among certain segments of society).

The 1964 Surgeon General's Report had noted increased consumption of cigarettes:

> Nearly 70 million people in the United States consume tobacco regularly. Cigarette consumption in the United States has increased markedly since the turn of the century, when per capita consumption was less than 50 cigarettes a year. Since 1910, when cigarette consumption per person (15 years and older) was 138, it rose to 1,365 in 1930, to 1,828 in 1940, to 3,322 in 1950, and to a peak of 3,986 in 1961. The 1955 Current Population Survey showed that 68 percent of the male population 18 years of age and 32.4 percent of the female population 18 years of age and over were regular smokers of cigarettes.

1964 SURGEON GENERAL'S REPORT, *supra* note 22, at 26.

26. Tobacco companies are bowing to the inevitable loss of market:

> To protect themselves, tobacco companies have begun to diversify. Recently, American Tobacco Company became American Brands, owning among other companies, Franklin Life Insurance, Sunshine Biscuits, and Jim Beam Whiskey. In the fall of 1985, Philip Morris Tobacco Company bought General Foods. It now owns Maxwell House, Sanka, Kool-aid, Seven-Up, Miller Hi-Life and Lowenbrau. R.J. Reynolds Company, now R.J.R. Nabisco, since it took over Nabisco Foods in September 1985, owns Kentucky Fried Chicken, DelMonte, Hawaiian Punch, Ritz Crackers, Planters Nuts, and Baby Ruths.

See, Stein, *supra* note 14, at 656, n.172. As this article goes to press, Kraft Inc. has just accepted Philip Morris' offer to buy the world's largest consumer products company. *See* Freedman & Gibson, *Kraft Accepts Philip Morris' Sweetened Offer Totaling $13.1 Billion, or $106 A Share in Cash*, Wall St. J., Oct. 31, 1988, at A3, col. 1. Moreover, to boost declining markets in the United States, American cigarette makers are focusing on Asia, a fact

smoking majority is aware that smokers who pollute shared air space are also injuring nonsmokers, one can expect a less silent majority, which will greatly accelerate the demise of the custom.

Some addicts, of course, are resisting the changes,[27] claiming a right to continue as before,[28] and they are unwilling to concede

---

which is upsetting Asian health officials. *See* Deans, *Where There's Smoke, There's Ire; U.S. Cigarettes Stir Anger in Asia*, Star Tribune, Dec. 11, 1988, at 22A, col. 1:

> During the past two years, while U.S. cigarette consumption has fallen nearly 5 percent, American cigarette makers have tripled their sales in Asia. . . . This year, more than $1.2 billion worth of U.S. cigarettes will be shipped to [Asia]. . . . But the stunning increase in U.S. cigarette sales in Asia has triggered alarm and outrage among health officials in Asian countries. At a time when U.S. Surgeon General Everette [sic] Koop has called for an end to smoking in the United States by the year 2000, many Asians are wondering at the moral justification for shipping billions of U.S. cigarettes overseas.

Id.

General Koop's goal of a smoke-free American society by the year 2000 has wide acceptance in this country. *See* Koop, *A Smokefree Society by the Year 2000*, N.Y. ST. J. MED., July 1985, at 290; *NEA Works Toward Smoke-Free Class of 2000*, NEA TODAY, Oct. 1988, at 18:

> NEA has joined the American Cancer Society, the American Heart Association, and the American Lung Association in a project to make this year's 3.1-million-member first grade class — the high school graduating class of 2000 — the nation's first ever to enter adulthood free from cigarette addiction and attendant health risks. . . . NEA is one of a dozen supporting organizations that joined the "Smoke-Free Class of 2000" effort during its planning phase in September 1987.

Id. But see, 1987 Smoking Restriction Unfair 1 NORTH DAKOTA SMOKERS 1 (May 1988) (A service of Philip Morris U.S.A.):

> Meanwhile, Gov. George Sinner has *infuriated* North Dakota smokers by joining seven Western governors who have challenged each other to *wipe out* tobacco use by the year 2000. They would like to create a "smokeless society.". . .The proposal [to participate in a competition to restrict smoking in public places] seems *unfair* and *unnecessary*, if not *ridiculous*, to many in the West, where much of the public property is wide open outdoors areas.

Id. Such a statement was obviously written by a Philip Morris employee in Washington, D.C., who does not understand that North Dakota people spend a great deal of time indoors.

27. *See Midair Smoking Protest Has Passengers, Crew Fuming*, Dallas Times Herald, Jan. 1, 1988, at 1 (detailing smoker resistance to the new California law banning smoking on all commercial plane, train and bus trips, and describing the scuffle between flight attendants and smoking passengers on a nonsmoking flight from Boston to Los Angeles one week earlier).

28. "The right of smokers to smoke ends where their behavior affects the health and well-being of others; furthermore, it is the smokers' responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke." 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at xii.

Recent case law rejects a smoker's right to smoke. *See, e.g.*, Gusendorf v. City of Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987) (court rejected a firefighter trainee's challenge to a no smoking regulation); Rossie v. Department of Revenue, 133 Wis. 2d 341, ———, 395 N.W.2d 801, 807 (Wis. Ct. App. 1986) (court rejected a smoker's claim that no smoking rules denied him equal protection under the laws).

But one often hears smokers claim a right to smoke. What is that right? Where does it come from? The perception that it exists is probably based upon apparent acceptance through custom, i.e., "I have a *right* to smoke because up until now no one has told me I can't. Look at all the other people smoking. Would they be smoking if they didn't have the *right* to smoke? Besides, you have a *right* not to smoke. Do I go around telling you you have to smoke? No, don't you tell me I can't." For a good discussion of the rhetoric of rights, see Westen, *The Rueful Rhetoric of "Rights"*, 33 UCLA L. REV. 977 (1986). Professor Westen writes:

that the license to smoke at will is revocable.[29] But licenses granted by custom are revoked when customs change. Consider these revoked licenses: guns were once a part of the attire of a well-dressed Western man;[30] cigarettes were a prop in constant use by actors in motion pictures;[31] chickens were free to feed in neighbors' yards;[32] only men rode in "smoking cars;"[33] by law and custom the races were kept separate;[34] one could spit in a public place;[35] and permission to hunt or fish on another's land was

---

> I believe that the persuasiveness of rights discourse is to a significant extent semantic. That is to say, the language of rights tends to persuade not by illuminating the matters at issue, but by concealing them through linguistic sleight of hand. The rhetoric of rights derives its force from deep-seated ambiguity in the ordinary meaning of the word "rights" — an ambiguity that causes disputing parties to assume away the very issues they purport to be addressing. The ambiguity is latent and, hence, does its work undetected (indeed, the ambiguity works precisely because it *is* undetected). Each party believes in good faith that the rights-claim being asserted derives its persuasiveness from the substance of the underlying claim, while in reality it draws its persuasiveness in substantial part from the form in which it is stated.

Id. at 978.

29. One would hardly expect an addict to be objective about his/her addiction. To the addict, his/her problems must, of course, be caused by something other than tobacco:

> It seems that appellant consumed one plug of his purchase, which measured up to representations, but when appellant tackled the second plug it made him sick, but, not suspecting the tobacco, he tried another chew, and still another, until he bit into some foreign substance, which crumbled like dry bread, and caused him to foam at the mouth, while he was getting "sicker and sicker." Finally, his teeth struck something hard; he could not bite through it. After an examination he discovered a human toe, with flesh and nail intact.

Pillars v. R.J. Reynolds, 117 Miss. 4901, ———, 78 So. 365, 366 (1918).

30. Today, carrying a handgun is usually a criminal offense. *See* N.D. CENT. CODE § 62.1-04-05 (1985).

31. Was there a movie made in the 1940s or 1950s which showed a leading man and a leading woman conversing without also smoking? Compare *Casablanca* (Warner Bros. 1942) with a recent movie such as *Suspect* (Tristar Pictures 1987). The former, of course, starred Humphrey Bogart. He smoked in virtually every scene and so did every supporting actor. The latter starred Cher. She did not smoke in a single scene, nor did her supporting cast. Bogart died of lung cancer.

32. *See* Kimple v. Schafer, 161 Iowa 659, 143 N.W. 505 (1913):

> The customs and habits of our people, with reference to the care of poultry, are so well established and so thoroughly understood that we think all would be shocked, to say the least, by a pronouncement from this court that they must fence them in, and that in the event any of them flew out and alighted on a neighbor's field the owner would be liable in trespass.

Id. at ———, 143 N.W. at 507.

33. *See* Payne v. Combs, 198 Ky. 749, 249 S.W. 1031 (1923): "[B]y habit and practice it has been the universal custom . . . [for ladies to ride in ladies' coaches], and the presence of a woman in a smoker would of itself attract attention and possibly lead to comment." *Id.* at ———, 249 S.W. at 1032.

34. *See id.* at ———, 249 S.W. at 1032. "The only statutory duty in this state as to the segregation of railway passengers is the provision for a separation of the races found in section 795, Ky. statutes . . . ." *Id.* at ———, 249 S.W. at 1032. Of course, the custom of segregation extended well beyond the walls of railroad cars. Ironically, segregation of the races was championed by powerful Southern congressmen, the same political force that protects the tobacco industry.

35. *See* People v. McKay, 46 Mich. 439, ———, 9 N.W. 486, 486 (1881) (spitting on the floor was "no offense against the good order of the place and the reasonable regulations made to govern it"). *Cf.*, Clark v. Murray, 264 App. Div. 843, ———, 35 N.Y.S.2d 483, 484

assumed.[36]

Recent changes in penology customs further illustrates the revocability of custom. Penology customs are said to change because society's standards of decency evolve.[37] For example, a bread and water diet and the strap, once considered to be customary conditions of confinement, are now viewed as cruel and unusual punishment.[38] More significantly, a federal district court just added involuntary exposure to passive smoke to the list of confinement conditions that may be cruel and unusual punishment.[39]

A nation's treatment of its prisoners is a reflection of the nation's values. If a court can conclude that involuntary exposure to passive smoke is harmful enough to be declared unlawful in a prison community, it is logical to conclude that the courts are accelerating the already discernible change in judicial attitude towards ETS.

As an example of that changing judicial attitude, consider the perception of the seriousness of "smoke contact." Less than a decade ago courts tended to label contact with passive smoke as "innocuous contact."[40] However, as the evidence that ETS is a serious health risk mounts, courts increasingly see this contact as

---

(1942) (city ordinance required signs prohibiting spitting upon the floor of any public place or conveyance). But even in the early years, it seems spitting in another's face was not considered proper. *See* Dunne v. Bernardy, 184 Ill. App. 89, 89 (1913) (plaintiff allowed recovery from defendant who spit tobacco juice on plaintiff's clothes and face).

36. Any North Dakota hunter or farmer will tell you this is no longer a warranted assumption.

37. The United States Supreme Court uses the changing standards of decency as a guiding principle as the Court struggles to interpret the Eighth Amendment. *See* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society' ") (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). *See also* U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

38. *See* Cunningham v. Jones, 567 F.2d 653, 657 (6th Cir. 1977) (holding that denying two of three meals a day, where the only meal given was inadequate for proper nutrition, equaled cruel and unusual punishment); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968) (holding that any use of the strap constituted cruel and unusual punishment).

39. Avery v. Powell, 695 F. Supp. 632, 635 (D.N.H. 1988).

40. *See* McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979):

> [I]n a crowded world, a certain amount of personal contact is inevitable and must be accepted. Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Smelling smoke from a cigar being smoked by a person in his own office would ordinarily be considered such an *innocuous and generally permitted contact.* In this case there is the added factor that the defendant was on notice that the smelling of cigar smoke was personally offensive to the plaintiff who considered it injurious to his health. In examining the plaintiff's claim, we observe that it has been said "it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability."

Id. at ———, 252 S.E.2d at 252 (emphasis added) (citations omitted).

harmful. A Pennsylvania court has noted: "The evidence of the toxic nature of tobacco smoke and its injurious and deleterious effects on health is very strong, not only to the smokers, but also to the nonsmokers who are exposed to 'secondhand' smoke."[41] A federal district court has agreed: "The uses of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking, but also to the non-smoking person who is required to breathe such contaminated air."[42] The Washington Supreme Court has succinctly stated: "The hazardous nature of cigarette smoke to nonsmokers is well established."[43]

The distinction between labeling ETS as "injurious and deleterious," "dangerous," and "hazardous" contact instead of "innocuous" contact is more than a semantic difference. Society's civil law condones "innocuous" contacts. However, it does not condone "harmful" or even "offensive" contacts, as evidenced by the evolution of personal injury torts in the civil law.[44] Thus, persons who smoke, and persons who are in charge of controlling the behavior of other people, should recognize that the radical metamorphosis of smoke contact creates new liability concerns. Some of those concerns are discussed in the sections that follow.

SAFE WORKPLACE

A business must provide a reasonably safe workplace for its employees. The common law recognizes this fundamental principle and imposes on employers a duty to eliminate all unreasonable risks from the workplace.[45] Government regulations have also

41. Lapham v. Unemployment Comp. Bd., 103 Pa. Commw. 144, ———, 519 A.2d 1101, 1102 (1987) (employee who suffered from a medical problem induced by secondhand smoke could not be denied unemployment compensation).

42. Avery v. Powell, 695 F. Supp. 632, 640 (D.N.H. 1985) (quoting R.I. GEN. LAWS § 23-20.6-1 (1985)).

43. McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 356 (1988). For further discussion of this case, see *supra* notes 54-58 and accompanying text.

44. Assault, battery and negligence are examples of personal injury torts which may arise from harmful or offensive contact. *See* Note, *supra* note 12, at 152. By analogy, microscopic particles, undetectable by the human senses, when deposited on the land of another constitutes physical invasion which is an element of the tort "trespass." *See* Bradley v. American Smelting and Refining Co., 104 Wash. 2d 677, 695, 709 P.2d 782, 792 (1985) (holding that the intentional deposit of microscopic particles resulting from copper smelting, onto the property of another, gave rise to a claim of trespass as well as nuisance). It follows that if these microscopic particles can physically invade real property, their intrusion into and onto human bodies is personal contact.

45. *See, e.g.*, Gordon v. Raven Sys. & Research, 462 A.2d 10 (D.C. 1983) (it is well established in the District of Columbia that an employer owes a duty to provide all of his employees with a reasonably safe workplace); Smith v. Western Elec. Co., 643 S.W.2d 10 (Mo. Ct. App. 1982) (it is well-settled in Missouri that an employer owes a duty to the employee to use all reasonable care to provide a reasonably safe workplace); Shimp v. New Jersey Bell Tel., 145 N.J. Super. 516, ———, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976) (an

been established to increase safety in the workplace.[46] Of course, this does not mean the employer has an absolute duty to remove *all* risks from the workplace. " '[T]he business of life must go forward;' the means by which it is carried forward cannot be rendered absolutely safe."[47]

Employees are exposed daily to significant risks. Workers who build skyscrapers are exposed to some risk of a fall, police officers who patrol the streets risk being shot, grain handlers are exposed to grain dust, mill workers risk being hit by flying wood particles, and steel plant workers may have to breathe some smoke generated by the smelting process.

Some risks are inherent in the business activity undertaken. On the other hand, while some eye strain may be a reasonable risk associated with a job as a secretary in a law office, a law office secretary should not have to risk several story falls, being shot at, being hit by flying wood particles, or breathing grain dust or smoke. In other words, whether a risk is reasonable depends upon whether it is a risk associated with the purposes for which the workplace exists.[48]

---

employer in New Jersey is under an affirmative duty to provide a work area that is free from unsafe conditions); McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 354 (1988) (Washington State worker's compensation legislation provides that workers suffering from disease which arise naturally and proximately out of their employment are limited to recovery under Washington's Industrial Insurance Act. This does not, however, bar rights to sue at common law for job-related diseases which are not covered under the Act). *See also* Bates, *Smoker vs. Nonsmokers: The Common Law Right to A Smoke-Free Work Environment*, 48 MO. L. REV. 783 (1983); Bracken, *Torts — Nonsmokers' Rights — Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area*, 9 TEX. TECH. L. REV. 353 (1977-78); Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 553 (1986); Paolella, *supra* note 9; Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987); Comment, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444 (1980); Comment, *Warning: California Antismoking Laws May be Dangerous to Your Health — An Analysis of Nonsmokers' Rights in the Workplace*, 14 PAC. L.J. 1145 (1983); Comment, *Nonsmokers' Rights: The Employer's Dilemma*, 28 ST. LOUIS U.L.J. 993 (1984); Comment, *The Rights of Nonsmokers in Tennessee*, 54 TENN. L. REV. 671 (1987); Comment, *The Worker's Right to a Smoke-Free Workplace*, 9 U. DAYTON L. REV. 275 (1984); Comment, *Limited Relief for Federal Employees Hypersensitive to Tobacco Smoke: Federal Employees Who'd Rather Fight May Have to Switch*, 59 WASH. L. REV. 305 (1984).

46. *See, e.g.*, Occupational Safety and Health Act (OSHA), 29 U.S.C. § 654 (1982) ("employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees"). *See also*, Health Promotion, 53 Fed. Reg. 33, 123 (1988) (to be codified at 32 C.F.R. § 85) (establishing a policy on smoking in Department of Defense occupied buildings and facilities).

47. Chicago, B. & O.R.R. v. Krayenbuhl, 65 Neb. 889, ———, 91 N.W. 880, 882 (1902) (citation omitted).

48. *See* Casenote, *The Positional Risk Doctrine in Minnesota: Gibberd v. Control Data Corporation*, 9 HAMLINE J.L. & PUB. POL'Y 145, 154 (1988) (indicating that the doctrine of positional risk construes injuries "arising out of employment" broadly). *But see* Gordon v. Raven Sys. & Research, 462 A.2d 10, 15 (D.C. 1983) (workers' compensation provides no

If a significant risk is not inherent in the workplace activity, there is nothing to justify a worker's exposure to it. A reasonable and prudent workplace manager who is aware of the risk will remove it. ETS is just such a risk.[49] Never inherent in any workplace activity, ETS was once thought to be an innocuous and insignificant risk. However, this is no longer true. The very significant health hazards of ETS are now well documented and have been since at least 1972.[50]

It was not until 1986 that broad dissemination of information about the hazards of ETS made the general public aware of them.[51] All managers now know, or should know, about those hazards. Consequently, there is little doubt that all workplaces today should be reasonably free of tobacco smoke to be considered a safe workplace.[52]

The Washington Supreme Court recently reached that conclusion. While not the first court to do so,[53] its 1988 decision in

---

protection to employers in a wrongful discharge suit). Workers' compensation only pays for injuries and disease; it does not protect workers from the harmful effects of ETS. *See* Shimp v. New Jersey Bell Tel., 145 N.J. Super. 516, ———, 368 A.2d 408, 416 (N.J. Super. Ct. Ch. Div. 1976) (court granted plaintiff injunctive relief not subject to workers' compensation legislation); McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 358 (1988) (employee was entitled to prove that a work-related disease was outside the basic coverage of that state's Industrial Insurance Act).

Workers' compensation statutes are designed to shield employers from suits by employees injured in the course of employment. Therefore, employers are immune from most suits brought by nonsmokers.

49. For a discussion of ETS and its effects, see *supra* note 5.

50. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING — A REPORT OF THE SURGEON GENERAL vii (1972) [hereinafter 1972 SURGEON GENERAL'S REPORT].

51. 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at ix.

52. The presence of tobacco smoke in the workplace has been the dominant theme of several court cases, as well as numerous law review articles. For a partial listing of such cases and articles, see *supra* note 45.

53. *See* Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976). Shimp (plaintiff), a smoke-sensitive employee, submitted documentation from her personal physician attesting to the fact that she was allergic to smoke. *Id.* at ———, 368 A.2d at 410. Attempts to resolve the problem by in-house resolution failed. *Id.* at ———, 368 A.2d at 410. The plaintiff subsequently sought injunctive relief to enjoin persons from smoking in the work area. *Id.* at ———, 368 A.2d at 410. The court granted plaintiff's requested relief holding that employees have a common-law right to a safe and healthy work place, and that employers have a duty to accommodate the employees' right. *Id.* at ———, 368 A.2d at 410.

The significance of the decision is underscored by the court's having taken judicial notice of the health hazards associated with cigarette smoking. *Id.* at ———, 368 A.2d at 414. The court concluded:

> The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs. The portion of the population which is especially sensitive to cigarette smoke is so significant that it is reasonable to

McCarthy v. Department of Social & Health Services[54] should prove to be the most significant nonsmoking workers' rights case to date.

The court in *McCarthy* held that the plaintiff, who developed a pulmonary disease from her constant exposure to tobacco smoke in the workplace, had stated a claim for negligence against her employer.[55] The court stated that an employer's duty to provide a safe workplace includes the duty to provide an environment reasonably free from tobacco smoke.[56] The court also took judicial notice of scientific evidence which proved that ETS is a significant health hazard to nonsmokers in general.[57] Among the scientific conclusions the court accepted were:

> The hazardous nature of cigarette smoke to nonsmokers is well established. In 1972, the Surgeon General indicated that a smoke-filled room often exceeds the legal limit for maximum air pollution and presents a possible health hazard to an exposed person. . . . More recently the Surgeon General undertook an extensive study of the scientific evidence on involuntary smoking as a potential cause of disease in nonsmokers. The Surgeon General, in 1986, made the following conclusions:
>
> 1. Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers. . . .
>
> 2. The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke. . . .

---

expect an employer to foresee health consequences and to impose upon him a duty to abate the hazard which causes the discomfort.

Id. at ———, 368 A.2d at 415-16. *See also* Smith v. Western Elec. Co., 643 S.W.2d 10, 13 (Mo. Ct. App. 1982) (employer's failure to eliminate tobacco smoke which is harmful to employee caused employer to breach duty to provide a reasonably safe workplace). *Cf.* Gordon v. Raven Sys. & Research, 462 A.2d 10, 14-15 (D.C. 1983) (the common law does not impose a burden on an employer to conform the workplace to an employee's particular sensitivity to tobacco smoke).

54. 110 Wash. 2d 812, 759 P.2d 351 (1988).

55. McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 354 (1988).

56. *Id.* at ———, 759 P.2d. at 356.

57. *Id.* at ———, 759 P.2d at 355. The *McCarthy* court spent little time on the issue of health hazards linked to cigarette smoking. This may be due in part to an ever increasing awareness of the health risks involved, and to the perceived credibility of the cited reports on smoking. *See id.* (court referred to the *1972 Surgeon's Report, supra* note 50; *1986 Surgeon General's Report, supra* note 2; Replace & Lowery, *A Quantitative Estimate of Nonsmokers' Lung Cancer Risk from Passive Smoking*, 11 ENV'T INT'L 3 (1985)). *Accord*, Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, ———, 368 A.2d 408, 414 (N.J. Super. Ct. Ch. Div. 1976).

> Another study concluded that approximately 5,000 nonsmokers die each year from lung cancer caused by involuntary smoking. . . . Added to this high cost in human life, are the various physical discomforts nonsmokers suffer when forced to work in smoke-filled work areas and the lost productivity and health care expenses due to smoking. . . . The Legislature has recognized that nonsmokers have a right to a clean air environment. . . .[58]

The court's acceptance of the Surgeon General's conclusions about the hazards of ETS to nonsmokers in general makes it much easier for a nonsmoker to prove that an employer has breached the common-law duty to provide a safe workplace. That is so because, while the safe workplace duty requires the employer to take reasonable precautions to control smoking in the workplace, reasonableness is judged by reference to a typical employee, not one with a special or particular sensitivity to tobacco smoke. Until *McCarthy* it was difficult for smoke-sensitive plaintiffs to prove that ETS also presented a hazard to the typical employee.

The plaintiff in *Gordon v. Raven Systems & Research, Inc.*[59] could have benefited from the Washington court's approach. Gordon was a smoke-sensitive employee who was fired when she refused to work in an area occupied by other employees who smoked cigarettes.[60] She subsequently brought an action for money damages, alleging that her termination was unlawful because her employer was negligent in not providing a smoke-free workplace.[61] The court recognized as well established "that an employer owes a duty to provide all of his employees with a reasonably safe workplace . . .,"[62] but rejected Gordon's claim, stating in part:

> [Gordon] has presented no scientific evidence of the deleterious effects of tobacco smoke on nonsmokers in general. Her claim is only that, as an employee with a particular sensitivity to cigarette smoke, she was owed a common law duty to a workplace free of tobacco smoke. . . . [T]he common law does not impose upon an employer the duty or burden to conform his workplace to the particular needs or sensitivities of an individual

58. *McCarthy*, 110 Wash. 2d at ———, 759 P.2d at 355.
59. 462 A.2d 10 (D.C. 1983).
60. Gordon v. Raven Sys. & Research, Inc., 462 A.2d 10, 11 (D.C. 1983).
61. *Id.* at 12.
62. *Id.* at 14.

employee.[63]

Thus, the *McCarthy* decision will help smoke-sensitive plaintiffs overcome the objection raised by the court in *Gordon*. In addition, McCarthy's success will encourage other employees to take action against their employers or threaten to do so if their employers refuse to provide a workplace free of tobacco smoke. Moreover, the employers dare not discharge recalcitrant workers who insist on a smoke-free workplace. The discharges might be viewed as retaliatory, creating for the employees retalitory discharge claims.[64]

Employers should also know that workers' compensation does not necessarily protect employers who are sued by nonsmoker employees. While there is at least a question about whether on-the-job tobacco-caused diseases are covered by workers' compensation,[65] workers' compensation laws clearly do not cover workers wrongfully discharged, nor do they provide protection when the relief sought by the employee is in the form of an injunction.[66] It follows that an employer who refuses to control ETS is not protected from employee suits. Moreover, as these actions increase in number, as they surely will, there will be a corresponding rise in the cost of employers' liability insurance.[67]

---

63. *Id.* at 15. The *Gordon* court recognized that the court in *Shimp* had taken "judicial notice of a plethora of scientific studies and affidavits of medical experts before concluding that cigarette smoke posed a serious health threat to all workers." *Id.* at 15. *See* Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976). Gordon apparently presented no such evidence, which in part explains the adverse ruling. The evidence, of course, existed in 1983, but not in the form of a well-documented 359-page report from the Surgeon General of the United States, which may suggest that the cost of independently gathering the evidence was prohibitive.

64. For a short discussion of the tort of retaliatory discharge and how it relates to smoking, see *infra* notes 159-61 and accompanying text.

65. "Compensable injury" is defined in section 65-01-02(07) of the North Dakota Century Code as

> an injury by accident arising out of and in the course of employment . . . but such term shall not include . . . any injury received because of the use of narcotics. . . . Such term, in addition to an injury by accident, includes:
> a. Any disease which can be fairly traceable to the employment. Ordinary diseases of life to which the general public outside of the employment is exposed shall not be compensable. . . . The disease must be incidental to the character of the business and not independent of the relation of employer and employee . . . .

N.D. CENT. CODE § 65-01-02(7) (1987).

66. *See Shimp*, 145 N.J. Super. at ———, 368 A.2d at 412 (New Jersey's worker's compensation law gives the exclusive remedy for money recoveries; it is silent with respect to injunctive relief). *See also* N.D. CENT. CODE § 65-01-01 (1985) (stating that workmens' compensation is the exclusive remedy for work-related injuries).

67. On the other hand, one would assume that an employer who removed ETS would receive more favorable employers' liability insurance rates.

PREGNANT WOMEN IN THE INVOLUNTARY SMOKE ENVIRONMENT

A pregnant woman who smokes harms her unborn child. Studies suggest fetal exposure to toxic smoke byproducts is produced when the woman inhales ETS.[68] The child may die because of it.[69] If it does not die it will have a lower than normal birth weight,[70] and it may have damaged lungs.[71] Moreover, the woman risks a number of pregnancy complications.[72]

It is thus likely that concerned parents will avoid exposing the mother/fetus to ETS.[73] Indeed, if they do not, they are not acting as reasonable and prudent parents, and may themselves be subject to liability for the harm caused to the fetus.[74]

---

68. A study conducted on nonsmoking pregnant women exposed to air contaminated with tobacco smoke demonstrated that maternal passive smoking exposes the fetus to toxic smoke byproducts. Bottoms, Kuhnert, Kuhnert, & Reese, *Maternal Passive Smoking and Fetal Serum Thiocyanate Levels*, 144 AM. J. OBSTETRICS & GYNECOLOGY 787 (1982). Fetal blood samples contained significant amounts of the tobacco byproducts produced by passive smoking. *Id.* at 790. This seems to indicate that fetuses are exposed to all of the same toxic substances as are other involuntary smokers. Consequently, higher levels of exposure to smoking during pregnancy are associated with adverse outcomes for the fetus. *Id.* From this one could conclude that the fetus is involuntarily receiving "substances from cigarettes that are more rapidly addictive than alcohol and as resistant to treatment as heroin." Note, *supra* note 12, at 144 n.39. Fetuses are also affected by smoke involuntarily inhaled by the nonsmoking mother. For instance, studies of nonsmoking pregnant women whose husbands smoke indicate these women may have low weight babies. *See* Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy*, 62 NOTRE DAME L. REV. 940, 944 (1986).

69. *See* NORTH DAKOTA STATE DEP'T OF HEALTH, TOBACCO, HEALTH AND THE BOTTOM LINE 38-44 (1986) [hereinafter THE BOTTOM LINE] (stating smoking may cause neonatal death by low birth weight, decreased oxygenation, maternal bleeding from the placenta, and may increase the rates of miscarriage and fetal death).

70. *Id.*

71. The results of a recent study conducted on animals led the Surgeon General to conclude that a fetus, whose mother either smokes or is exposed to ETS, may suffer exposure to constituents of tobacco smoke in utero. 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 31. The compounds are delivered to the fetus transplacentally, and there was evidence of "reduced lung volume at term and saccules that were reduced in number and decreased in size as a result of the reduced formation of saccule partitions. These hypoplastic lungs showed an internal surface area that was decreased." *Id.*

72. Premature detachment of the placenta is a common complication of pregnancy for smokers. The resultant blood loss may be fatal to fetus and mother. *See* THE BOTTOM LINE, *supra* note 69, at 39.

73. Second-hand smoke, especially sidestream smoke, contains higher concentrations of toxic components because smokers filter mainstream smoke by inhaling it while sidestream smoke escapes unfiltered. *See* 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 4.

74. In determining whether a parent has acted negligently, the standard to be applied is the traditional one of reasonableness viewed in light of the parental role, i.e., what would an ordinarily reasonable and prudent parent have done in similar circumstances? *See* Gibson v. Gibson, 3 Cal. 2d 921, ———, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (15-year-old successfully sued parents for negligently maintaining a backyard pool after he was injured in a swimming accident).

The standard of care of a pregnant woman is said to be the reasonable pregnant woman. *See* Grodin v. Grodin, 102 Mich. App. 396, ———, 301 N.W.2d 869, 870-71 (1981) (focal question is whether the decision of the mother was a reasonable exercise of parental discretion). In *Grodin* the court reversed and remanded for a determination of whether a

The caring employer of pregnant employees will, of course, accommodate that concern by eliminating ETS from the work environment. The noncaring employer who ignores the problem risks both short and long term liability for harm to the fetus and mother.

The short term liability to the mother flows from the common-law duty to provide a safe workplace,[75] a duty which must take into account the mother's concern for the health of her highly vulnerable fetus. That concern may cause a pregnant woman to suffer severe emotional distress when she realizes that the unsafe conditions in her workplace are injuring her fetus.[76]

---

mother's negligent ingestion of tetracycline through her seventh month of pregnancy made her liable to her child who later developed discolored teeth. *Id.* at ———, 301 N.W.2d at 871. *Grodin* was narrowed somewhat in *Wright v. Wright.* 134 Mich. App. 800, 351 N.W.2d 868 (1984) (court stated that the question of reasonable parental discretion is not *per se* a jury question). A reasonable pregnant woman would be expected to have knowledge about the potential risks of her behavior that at least equals the knowledge held by the typical person in her community. She could therefore be expected to have regular prenatal checkups, maintain a balanced diet, and entirely avoid alcohol and narcotic use.

Nicotine is a highly addictive narcotic. 1988 SURGEON GENERAL'S REPORT *supra* note 15, at i. It follows that nicotine use during pregnancy is negligent conduct, especially in light of the evidence that smoking harms the fetus. Moreover, "[t]he nation's legal system has begun to take drastic measures aimed at making pregnant women legally accountable for the fetuses they carry." Sherman, *Keeping Baby Safe From Mom*, NAT'L L.J., Oct. 3, 1988, at 1. James Bopp, Jr., general counsel to the National Right to Life Committee, argues: "Behavior is potentially subject to activity by the state whenever there is knowing and intentional behavior that has substantial risk of harm to the life or health of the fetus." *Id.* at 24. However, Mr. Bopp would not condone state sanctions against pregnant women who knowingly and intentionally use legal drugs such as tobacco, alcohol or caffeine, *even though they also significantly harm fetuses. Id.* at 24 (emphasis added). As the evidence of harm to the fetus from alcohol and tobacco mounts, the distinction between "illegal" and "legal" drugs becomes irrelevant. To argue otherwise is somewhat like saying a gunshot victim's injuries should be ignored because the assailant had a license to use a gun.

75. For a discussion of the employer's duty to provide a safe workplace, see *supra* notes 45-67 and accompanying text.

76. Courts have determined that a plaintiff may recover for fear of future harm. *See generally* Comment, *Emotional Distress Damages For Cancerphobia: A Case for the DES Daughter*, 14 PAC. L.J. 1215 (1983) (DES daughters who suffer emotional distress prior to developing cancer are able to meet the standards for an independent cause of action based on their cancerphobia). *See also* Gale & Goyer, *Recovery for Cancerphobia and Increased Risk of Cancer* 15 CUMB. L. REV. 723 (1985) (cancerphobia, as a particular kind of mental anguish, is generally recognized as compensable). With or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence. Hagerty v. L & L Marine Servs., Inc., 788 F.2d 315, 318 (5th Cir. 1986). Reasonable foreseeability of the claimed injury is satisfied by existence of a reasonable fear and does not require a high degree of likelihood that the feared contingency is likely to occur. Wetherill v. University of Chicago, 565 F. Supp. 1553, 1559 (N.D. Ill. 1983). Given the studies done on the effects of ETS on fetuses (*see supra* note 68), it is reasonable to assume that any prudent pregnant working woman would suffer emotional distress from the justified fear that with her every breath, ETS is harming her helpless fetus.

Enhanced risk of future injury has also been the basis for claims. In *Ayers v. Jackson Township* residents brought a nuisance action against a township as a result of contamination of water by toxic pollutants. Ayers v. Jackson Township, 106 N.J. 557, ——— , 525 A.2d 287, 289 (1987). The court allowed residents damages for cost of medical surveillance based upon enhanced, although unquantified, risk of disease in the future as a result of exposure to toxic chemicals. *Id.*

Both short and long term liability to the child are based upon general negligence principles, among them being the generally accepted view that a child can sue for prenatal injuries resulting from the negligence of a third party toward the child's mother.[77] While actions by the child against its mother's employer present some special problems,[78] as has been demonstrated in actions brought by children in other kinds of situations involving parental exposure to workplace hazards,[79] the uncertainty is offset at least in part by the fact that the possibility exists that for many years the employer may be exposed to catastrophic losses.[80] The DES daughter[81] cases provide an analogous fetal injury situation.

---

77. A child has long had the right to recover in tort for the negligent infliction of prenatal injuries by a third person. *See, e.g.*, Bonbrest v. Kotz, 65 F. Supp. 138, 142 (D.C. Cir. 1946) (if a child is born alive and is viable, any action for injuries sustained while in the mother's womb should be allowed). In *Bonbrest* an infant brought a malpractice suit for injuries incurred while being removed from its mother's womb. *Id.* The court noted that it is said a fetus maintains the potentiality for life and has the right to future enjoyment of life and to the full use of its limbs and body. *Id.* at 140-41. Therefore, when medical authorities can link a prenatal congenital structural defect to the prenatal environment, the child has a right to recover postnatally.

78. A full development of the problems associated with children bringing actions against the mother's employer is outside the scope of this article. Workers' compensation issues, among others, may be involved. However, as was demonstrated in *McCarthy v. Department of Social & Health Services*, workers' compensation laws do not always grant employer immunity from employee suits, and it would seem a prudent employer would act assuming that they do not, especially where the potential plaintiff is the fetus. *See* McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, ———, 759 P.2d 351, 353-54 (1988) (state's exclusive employee remedy provisions, which abolish other civil remedies, did not bar employee's claim against Department of Health Services for failing to provide a smoke-free work place).

79. See Note, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 J. L. REFORM 237 (1979):

> The birth defective child has three substantial barriers which must be surmounted before he or she can obtain a judgment against the employer. First, it may be impossible to maintain an action under state law for a preconception or prenatal injury. Second, . . . it is not at all clear what employer duty under tort law could be invoked to support a damage recovery. . . . The third . . . is establishing causation.

Id. at 253-56.

80. The DES daughter (see *infra* note 81) lawsuits demonstrated this possibility. Some of those lawsuits were commenced many years after the daughters were exposed to the DES. The latency period for DES exposure can be as long as 20 years. *See* Comment, *supra* note 76, at 1223 n.75.

81. "The DES daughter is a term used to describe the female offspring of women who were administered the drug diethylstilbestrol (DES) during . . . pregnancy to prevent miscarriages." Comment, *supra* note 76, at 1215 n.2. The drug was used extensively by pregnant women from 1947 through 1971. *Id.* at 1218. Once the drug is administered to a pregnant woman it permeates the fetus, resulting in an increased risk of contracting clear-cell adenocarcinoma among the daughters exposed to DES in utero. *Id.* at 1216. After the publication in 1971 of several scientific studies linking the use of DES by pregnant women to vaginal cancer in their daughters, the Federal Drug Administration suspended the use of DES by pregnant women. *Id.* at 1219. Manufacturers of DES have been subjected to numerous lawsuits instituted by DES daughters who suffered a physical injury linked to their prenatal exposure to the drug. *Id.* at 1225. There have been estimates that as many as 1000 DES lawsuits were in the nation's courts in 1980. *Id.* at 1216 n.12. For additional discussion on the "DES Daughter," see *supra* note 80.

The employer should take little solace from a pregnant employee's apparent willingness to accept for herself and her fetus the risks associated with ETS. The workplace is not a democracy. Many employees are not in the workplace by choice — economic exigencies place them there. Moreover, job performance is measured in part by whether the employee is a "team player." An employee who gets along well with fellow employees has much more job security than one who does not, a fact which militates against a nonsmoker's inclination to complain about a traditionally sanctioned activity engaged in by fellow employees.[82]

Many working women who become pregnant also become less secure in their positions, a sad commentary on the status of working mothers in America today.[83] Those who would expect a pregnant worker to choose this time to complain about ETS have little appreciation for the plight of many working mothers. After all, she and her unborn child, as well as the rest of her family, may depend upon her job for the necessities of life.

Even if we assume that the pregnant worker voluntarily exposes herself and her fetus to the hazards of ETS in the workplace, that does not extinguish the employer's liability to a fetus injured by that exposure. When the mother inhales the ETS, she is acting negligently toward her child,[84] and because she is doing so while acting within the scope of her employment, her employer is vicariously liable for the consequences of her negligent act.[85] Moreover, assuming a pregnant woman voluntarily exposes herself to the risks, it is doubtful whether she can also assume the risk on

82. Most employees value their employment and tolerate unpleasant conditions of employment for that reason. ETS is for many just one of those unpleasant conditions. Every employer should know by now that smoking in the workplace is a burning issue and not assume that a nonsmoker's silence is acquiescence to the status quo which allows smokers to control the workplace's air quality. There is no freedom to choose not to smoke in an office environment. If some smoke, everyone smokes. When the employer neglects to set policy, the employer abdicates that responsibility to the nicotine addicts.

83. Working women as a whole have less job security than men in spite of federal legislation such as Title VII of the Civil Rights Act of 1964. *See generally* Buss, *Getting Beyond Discrimination: A Regulatory Solution to the Problem of Fetal Hazards in the Workplace*, 95 YALE L.J. 577 (1986). *See also* 42 U.S.C. § 2000e(k) (1982), *reprinted in* CIVIL RIGHTS ACT OF 1964, §§ 701-716. Some employers have responded to the legislative efforts by eliminating women from the workplace, particularly if faced with the threat of claims of negligence by a child born to an employee and damaged by a toxic hazard while the parent was employed. Buss, *supra*, at 578-79.

84. For a discussion of smoking and prenatal injuries, see *supra* note 74 and accompanying text.

85. Holding an employer liable for the injuries to the child because of the mother/employee's exposure to ETS is based on long-standing and well-settled *respondeat superior* principles. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1957).

behalf of her unborn child.[86] The duty is to the child. The creator of the risk, in this case the employer who permits the condition to continue, remains liable to the child.[87]

The prudent pregnant woman who rightly refuses to work in a tobacco smoke-filled environment presents yet another problem for the noncaring employer. Discharging the recalcitrant employee may result in a wrongful discharge action.[88] Moreover, because her pregnant condition is the underlying reason for her action, the employer's act may be viewed as discrimination against a pregnant woman, which violates the pregnant worker's civil rights.[89]

HANDICAPPED PERSONS

The Federal Rehabilitation Act of 1973 (FRA)[90] may give many smoke-sensitive individuals who find their activities curtailed by the presence of ETS reason to be optimistic about possi-

---

86. An injured worker-parent cannot waive the rights of or assume the risk for the child. Note, *supra* note 79, at 253.

87. *See* Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960):

> [J]ustice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child.

Id. at ———, 157 A.2d at 503. *See also supra* note 77 for a discussion of the common-law right of child to sue a tortfeasor for negligently inflicted injuries.

88. *See infra* notes 159-61 and accompanying text for a discussion of the tort retaliatory discharge.

89. Because Title VII of the Civil Rights Act of 1964 requires nondiscrimination on the basis of sex, the employer cannot meet his duty to provide a safe workplace by hiring only men. *See* Note, *supra* note 79, at 245-48. Also, firing or in other ways discriminating against the pregnant employee would be a violation of the Pregnancy Discrimination Act. 42 U.S.C. § 2000e(k) (1982). The Pregnancy Discrimination Act prevents discrimination on the basis of pregnancy, childbirth, or related medical conditions. *Id.* The Pregnancy Discrimination Act provides:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k) (1982).

90. Federal Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 701-794a (1982)).

ble legal recourse against employers and others who ignore their special needs. The FRA protects "handicapped individuals"[91] who belong to one of three large groups: (1) employees of the federal government, (2) students and employees of federal grant recipients, and (3) employees of federal contractors.[92] Many millions of Americans fall into these categories, and a substantial number of them are in various degrees sensitive to ETS.

Persons with a debilitating sensitivity to ETS can qualify as "individuals with handicaps" under the FRA.[93] As an increasing number of persons become aware that an adverse reaction to ETS may trigger rights under the FRA, one should expect that many persons who now silently suffer a smoke sensitivity handicap will seek to have those rights enforced. That in turn will force managers to focus on the FRA's mandated accommodation of these persons' handicaps.

Because the courts have so recently begun appreciating the severity of the ETS problem, there are few cases which focus on smoke-sensitive persons' handicaps. However, *School Board of Nassau County v. Arline*,[94] a recent United States Supreme Court case which involved a person with a pulmonary disease caused by tuberculosis,[95] should give to handicapped smoke-sensitive persons encouragement that protection for respiratory handicapped persons exists. Moreover, the Court's opinion will be helpful in formulating future actions. The opinion reviews and explains the relevant federal statutes and regulations and provides a detailed map through the statutory and regulatory maze — a map which smoke-sensitive persons seeking protection from ETS can easily follow. While an in-depth discussion of *Arline* and the federal laws it interprets are outside the scope of this article,[96] a few highlights

91. Effective October 21, 1986, an amendment to the Rehabilitation Act of 1973 substitutes "individuals with handicaps" for "handicapped individuals" throughout the provisions of the Act. 29 U.S.C. § 706 (Supp. 1987).

92. Paolella, *supra* note 9, at 615.

93. *See, e.g.*, Carter v. Tisch, 822 F.2d 465, 466-67 (4th Cir. 1987) (postal clerk with asthma is a handicapped person); Vickers v. Veterans Admin., 549 F. Supp. 85, 86-87 (W.D. Wash. 1982) (smoke-sensitive employee of the Veterans Administration (VA) is a "handicapped person" within the contemplation of the Federal Rehabilitation Act of 1973).

94. 107 S. Ct. 1123 (1987).

95. School Bd. of Nassau County v. Arline, 107 S. Ct. 1123, 1125 (1987).

96. For further discussion of the Rehabilitation Act of 1973, see Prewitt v. United States Postal Serv., 662 F.2d 292, 302-304 (5th Cir. 1981) (discussing the FRA in the context of an applicant who applied for a clerk/carrier position with the United States Postal Service, but was denied employment because of a shoulder injury); Annotation, *Who is "Qualified" Handicapped Person Protected from Employment Discrimination Under Rehabilitation Act of 1973 (29 USCS sections 701 et. seq.) and Regulations Promulgated Thereunder*, 80 A.L.R. FED. 830 (1986); Annotation, *Availability of Private Right of Action Under Section 503 of Rehabilitation Act of 1973 (29 USCS Section 793), Providing That*

will serve our limited purpose.

Arline was an elementary school teacher who was discharged after suffering a third relapse of tuberculosis within two years.[97] After she was denied relief in state administrative proceedings, she brought suit in federal court alleging that her dismissal because of her tuberculosis violated section 504 of the FRA.[98] The questions which ultimately reached the United States Supreme Court were: (1) whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of section 504, and, if so (2) whether such an individual is "otherwise qualified" to teach elementary school.[99]

The Supreme Court affirmed the Eleventh Circuit Court of Appeals' holding that "persons with contagious diseases are within the coverage of section 504" and that Arline's condition "falls . . . neatly within the statutory and regulatory framework" of the FRA.[100] The court of appeals had remanded the case "for further findings as to whether the risks of infection precluded Arline from being 'otherwise qualified' for her job, and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position.[101] The Supreme Court also affirmed the court of appeals' decision to remand.[102]

Among the federal statutes and rules the Court reviewed were these provisions:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in . . . any program or activity receiving Federal

---

Certain Federal Contracts Must Contain Provision Requiring Affirmative Action to Employ Qualified Handicapped Individuals, 60 A.L.R. FED. 329 (1982); Annotation, *Construction and Effect of Section 504 of the Rehabilitation Act of 1973 (20 USCS Section 794) Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals in Specified Programs or Activities*, 44 A.L.R. FED. 148 (1979).

97. *Arline*, 107 S. Ct. at 1125.

98. *Id.*; Federal Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). In discussing the applicability of section 504 of the FRA to protecting nonsmokers, one commentator has suggested:

> Section 504 of the Rehabilitation Act is probably the most significant section of the Act for nonsmokers because it applies to any recipient of federal funds regardless of the dollar amount received. Even indirect federal funding triggers the application of Section 504. Among others, this section applies to schools, universities, medical institutions, and most entities of state and local governments.

Paolella, *supra* note 9, at 618 (citations omitted).

99. *Arline*, 107 S. Ct. at 1125.

100. *Id.*

101. *Id.* at 1126.

102. *Id.* at 1132.

financial assistance. . . ."[103]

A "handicapped individual" is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[104]

A "physical impairment" is "any physiological disorder or condition . . . affecting one or more of the following body systems: . . .respiratory, including speech organs; cardiovascular; reproductive. . . ."[105]

The regulations define "major life activities" as "functions such as . . . breathing, learning, and working."[106]

The Court had little trouble concluding that Arline was a "handicapped individual."[107] Somewhat more perplexing was the question of whether the contagious effects of her physical impairment took her out of section 504's protection. However, the Court concluded that to do so would deny handicapped individuals jobs or other benefits because of the prejudiced attitudes and ignorance of others.[108] The Court stated that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment."[109]

That left the question of whether Arline was "otherwise qualified" for the job of being an elementary school teacher.[110] Since the record did not contain facts upon which the resolution of that question depended, the Court remanded the case to the district court to decide the issue.[111] In the process, the Court stated that "[t]he basic factors to be considered in conducting this inquiry are well established,"[112] and listed them as follows:

'An otherwise qualified person is one who is able to

103. *Id.* at 1126 (quoting 29 U.S.C. § 794 (1982)).
104. *Id.* (quoting 29 U.S.C. § 706(7)(B) (1982)).
105. *Id.* at 1127 (quoting 45 CFR § 84.3(j)(2)(i) (1985)).
106. *Id.* at 1127 (citing 45 C.F.R. § 84.3(j)(2)(ii)). The Court's discussion emphasized that before physical impairments qualify as handicaps, there must be interference with a major body system and the interference must be substantial. *Id.* Arline's hospitalization for her condition helped establish that one or more of her major life activities were substantially limited by her impairment. *Id.*
107. *Id.* at 1127-1130.
108. *Id.* at 1129.
109. *Id.*
110. *Id.* at 1130-31.
111. *Id.* at 1132.
112. *Id.* at 1131.

> meet all of the program's requirements in spite of his handicap.' In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' on a grantee, or requires 'a fundamental alteration in the nature of [the] program.'[113]

A smoke-sensitive individual is a "handicapped individual" under the definitions set out in *Arline*. He/she has a "physical impairment" of a "body system" that limits such "life activities" as "breathing, writing and working."[114] Thus, reasonable accommodation must be rendered.[115]

While *Arline* did not involve a smoke-sensitive person, the case demonstrates that the United States Supreme Court will insist that reasonable accommodation be made for pulmonary-related

---

113. *Id.* n.17 (citations omitted). The Court also cited to section 84.12(c) of title 45 of the Code of Federal Regulations as including a list of factors to consider in determining whether accommodation would cause undue hardship. *Id.*; 45 C.F.R. § 84.12(c) (1985). One of the factors listed in the regulations is "[t]he nature and cost of the accommodation needed." 45 CFR § 84.12(c)(3) (1985).

114. *See* Federal Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(b) (defining handicapped person).

115. *Carter v. Tisch* also provides some accommodation guidance. Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). Carter was a postal clerk who, because of his asthma handicap, was unable to perform the duties of a custodian. *Id.* at 466. He argued that the postal service was required to "accommodate" his handicap by assigning him to reduced duties. *Id.* His accommodation request was denied because there were no light duty positions available, and the assignment was prohibited by a collective bargaining agreement. *Id.* In affirming a denial of the requested accommodation, the court stated:

> The postal service was not under an obligation to "accommodate" him by assigning him to permanent light duty. The case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment. . . . Section 504 of the Rehabilitation Act provides that: No *otherwise qualified* individual with handicaps . . . shall, solely by reason of his handicap, be excluded. . . . A handicapped person is said to be "otherwise qualified" for a position if he can perform the job if reasonable accommodation is made for his handicap. . . . [A]n employer cannot be required to accommodate a handicapped employee by restructuring a job in a manner which would usurp legitimate rights of other employees under a collective bargaining agreement. . . .

Id. at 467. While it is possible that the "right to smoke" is included in some collective bargaining agreements, and would therefore give smokers an argument against making the worksite free of ETS, given the hazards associated with smoking and ETS, such an agreement would seem to be against public policy. In the absence of such an agreement, however, there should not be a question about whether removing ETS is reasonable. When removed, so is the impediment to an "otherwise qualified" handicapped person doing his or her job.

handicaps of persons covered under the FRA. Accommodation for a person with a contagious disease presents a far different and more complex problem than does accommodation for a person who is handicapped only because of ETS. Few accommodations for an individual who is handicapped are easier to make than is accommodation for an individual with a smoke sensitivity handicap. That accommodation is simple, inexpensive, and can be acted upon immediately. All that is needed is an executive decision banning all smoking from the premises, a notice to smokers that such a ban exists, and enforcement of the ban. Such a policy would not impose "undue financial and administrative burdens" or require "a fundamental alteration in [the] program."[116] Moreover, it would also promote public policy by improving the general health and welfare of all others who breathe the affected air.[117]

Some smokers will argue that they too are "handicapped individuals."[118] The Surgeon General has declared that nicotine is "as addictive as heroin,"[119] thereby defining smokers as addicts. Drug addicts and alcoholics are not categorically excluded from the FRA.[120] Excluded are only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individuals from performing the duties of the job in question *or whose employment . . . would constitute a direct threat to property or the safety of others.*"[121] Smoking is a threat to property as evidenced by the number of fires linked to smoking.[122] ETS is also a direct threat to the safety of others.[123] Therefore, nicotine addicts are

---

116. *Arline*, 107 S. Ct. at 1131 n.17 (citations omitted).

117. A total ban on ETS may be also justified by comparing the handicapped smoke-sensitive individual to those discriminated against because of race:

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Robinson v. Lorrilard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

118. *See*, Classen, *Restricting the Right to Smoke in Public Areas: Whose Rights Should Be Protected?*, 38 SYRACUSE L. REV. 831, 850 (1987).

119. 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at 14.

120. 29 U.S.C. § 706(7)(B) (1982 & Supp. 1986) (amendments to 29 U.S.C. § 706(7)(B) refer to this section as paragraph (B)(B)).

121. *Id.* (emphasis added).

122. Note, *supra* note 12, at 138. Smoking also has other economic impacts other than by physical losses due to fires. "Estimates show that, in the United States, medical care and lost productivity costs attributable to cigarette smoking total about $65,000,000,000 annually." Boulton, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U.L. REV. 643, 645 n.11 (1987).

123. *See generally* 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 13 (addressing the health consequences of involuntary smoking).

excluded from coverage under the FRA.

The FRA would make injunctive relief available to qualifying smoke-sensitive employees, a remedy which is generally not specifically provided for under workers' compensation laws.[124] Although it is questionable whether money damages are recoverable,[125] additional incentives for compliance by the employer are that attorney's fees are authorized,[126] and recipients of federal funds will lose future federal funding if they do not comply with the FRA.[127]

OTHER CONCERNS

ETS in the workplace or public indoor environments affects other areas of liability. Each area is broad enough, and important enough, to justify a separate law review article. However, even a cursory examination of these issues supports this article's contention that allowing ETS in these areas exposes employers and other managers to an unreasonable financial and legal risk.

EMPLOYER'S VICARIOUS LIABILITY

Employers are liable for the acts of their employees committed within the scope of employment.[128] When an employer knows or should know that his/her employees smoke, the employer is liable for the damages and injuries caused by smoking on the job.[129]

As smoking is increasingly limited by law and policy in more

124. *See* N.D. CENT. CODE § 65-04-27.1 (1985) (injunctive relief is only available against employers who do not employ insured workers, pay premiums, or violate safety rules and regulations).

125. *See*, Paolella, *supra* note 9, at 622 (citations omitted).

126. 29 U.S.C. § 794a(b) (1982).

127. Loss of funding for failure to conform with the Act is an extreme remedy, but is nevertheless provided for. *See* 45 C.F.R. § 84.5(a) (1986).

128. *See* RESTATEMENT (SECOND) OF AGENCY § 243 (1957) (when a principal controls an agent, it is as if the principal himself is acting, and is thus liable to third parties injured by the agent).

129. *See, e.g.*, Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 18 (Minn. 1979) (employer was held liable for damage to motel when employee discarded cigarette in motel wastebasket); Iandiorio v. Kriss & Senko Enters., 512 Pa. 392, ———, 517 A.2d 530, 534 (1986) (employer who noticed that employee discards smoking materials in the wastebasket may be held liable to a third party who entered a designated smoking area wearing gasoline-drenched clothing and was burned when an employee struck a match to light a cigarette); Maryland Casualty Co. v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 81 Wis. 2d 248, ———, 260 N.W.2d 380, 380 (1977) (employer was held liable for damages to a motel caused when an employee smoked in bed). *But see* Herr v. Simplex Paper Box Corp., 330 Pa. 129, ———, 198 A. 309, 310-13 (Pa. 1938) (defendant not liable for injury to plaintiff caused by employee's cigarette; *see* cases cited therein). These older cases tended to take a more restrictive approach to the act of smoking, viewing it more as an act of "a personal nature," outside the scope of employment. However, as the more recent cases such as *Maryland Casualty* and *Edgewater Motels, Inc.* indicate, this view is changing.

and more places,[130] and as the law reflects custom's recognition that smoke contact is more than innocuous contact,[131] a smoking employee dramatically increases her/his employer's exposure to liability.[132]

PREMISES LIABILITY

An operator of premises open to the public has a duty to maintain the premises in a reasonably safe condition for foreseeable entrants.[133] The proliferation of nonsmoking laws is justified in part by concerns for the health of smoke-sensitive people who may be foreseeable entrants.[134] It follows that an operator who is

---

130. *See* Note, *supra* note 12, at 172:

> As of 1987, forty-six states and the District of Columbia have passed legislation restricting smoking for the benefit of nonsmokers. The statutes generally share four common elements which the American Lung Association has determined should be included in effective antismoking legislation: (1) a definition of terms such as "public place;" (2) a requirement that the public be put on notice as to where smoking is prohibited or restricted; (3) clear delegation of authority to an official or agency responsible for enforcing the regulations; and (4) penalty provisions for violations.

Id.

131. For a discussion on the affect of tobacco smoke and the employer's duty to provide a healthy workplace, see *supra* note 53 and accompanying text.

132. Consider, for example, the employer who employs delivery persons who smoke. Every time one of those smoking employees enters a nonsmoking area, the potential for liability exists. Smoke-free areas are created at least in part to protect the health of smoke-sensitive people. *See* Note, *supra* note 12, at 172 (state legislatures have passed numerous laws restricting smoking in public places). Moreover, there appears to be a staggering number of such people. Estimates indicate that from 34,000,000 to over 51,000,000 people are smoke-sensitive. *See infra* note 173. Should an employee's act of smoking trigger an adverse reaction in any one of them, legal action against the employer is a very real possibility.

133. *See* RESTATEMENT (SECOND) OF TORTS § 343 comment (1965). Entrants are also known as "invitees." Prosser gives these examples of instances in which plaintiffs have been held to be invitees: "Those attending free public meetings; [s]pectators at public amusements, entering on a free pass; [f]ree use of a telephone provided for the public; [e]ntering a bank to get change for a $20 bill; [c]oming to get things advertised to be given away; [u]se of state or municipal land open to the public; [and] [v]isitors in national parks" (citations omitted). W. PROSSER, J. WADE & V. SCHWARTZ, TORTS, CASES AND MATERIALS 470 (8th ed. 1988).

134. *See, e.g.*, N.M. STAT. ANN. § 24-16-2 (Supp. 1985):

> The Legislature finds and declares that the smoking of tobacco, or any other weed or plant, is a positive danger to health and a health hazard to those who are present in enclosed places and that smoking in such areas should be confined to designated smoking areas. The Legislature further declares its intention to protect the public health from such hazards in public places and places of employment. . . .

Id. See also, Note, *supra* note 12: "Generally, the states' concern in enacting laws which restrict smoking is focused on the health of non-smokers . . . ." *Id.* at 172.

The 1986 Surgeon General's Report was the basis for health concern legislation by at least one state legislature. *See* CAL. HEALTH & SAFETY CODE § 25948 (West 1988):

> § 25948. Legislative findings and declarations (a) The Legislature hereby finds and declares that the United States Surgeon General's 1986 Report on the Health Consequences of Involuntary Smoking conclude all of the following:
> (1) Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.

charged by law with the responsibility of maintaining a smoke-free environment, but does not, is exposing him- or herself to situations pregnant with liability.[135]

INCREASED UNEMPLOYMENT COMPENSATION COSTS

At least five states have granted unemployment benefits to nonsmokers because of their inability to work in a smoke-filled environment.[136] As evidence of the harmful effects of secondhand smoke becomes more widely accepted by the courts, this trend is likely to continue.

Lapham v. Unemployment Compensation Board[137] is representative. This 1987 case involved an unemployment compensation claimant who suffered chronic bronchitis due to exposure to cigarette smoke in the work area.[138] Her employer was aware of the problem and offered to relocate her within the office to an area

---

(2) The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lungs mature.
(3) The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.
(b) The Legislature further finds and declares the following:
(1) Nonsmokers have no adequate means to protect themselves from the damage inflicted upon them when they involuntarily inhale tobacco smoke.
(2) Regulation of smoking in public places is necessary to protect the health, safety, welfare, comfort, and environment of nonsmokers. . . .

Id. § 25948.

135. Assume a person charged by law with the responsibility of enforcing nonsmoking regulations either does not enforce them or is negligent in doing so. If we further assume that a smoke-sensitive person suffers an adverse reaction, liability seems clear. Moreover, the presence of these potential plaintiffs is foreseeable because a whole host of diseases are aggravated by ETS. *See* Note, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus The Right To Clean Air*, 45 MO. L. REV. 444 (1980):

> Although the full extent of the dangers of involuntary smoking is not yet known, certain conclusions have already been stated with confidence:. . . People with certain heart diseases may suffer exacerbations of their symptoms as a result of involuntary smoking. . . . People with certain lung diseases (e.g., chronic bronchitis, emphysema) have considerable excess mortality under conditions of severe air pollution, and involuntary smoking situations can produce pollutants to a degree as high or higher than those that occur during air pollution emergencies. . . . Many individuals appear to be allergic to tobacco smoke. . . . Symptoms vary from 'eye irritation, nasal symptoms, headache, cough, wheezing, sore throat, nausea, hoarseness, dizziness, upper respiratory tract distress, choking sensation, loss of memory, lightheadedness, difficulty in concentration, depressive personality changes, double vision, short blackouts, to lesions on the skin.'

Id. at 448 (citations omitted).

136. Five states — California, Iowa, Idaho, Pennsylvania and Washington — have granted unemployment benefits to nonsmokers who could not work in tobacco smoke polluted environments. Paolella, *supra* note 9, at 630.

137. 103 Pa. Commw. 144, 519 A.2d 1101 (1987).

138. Lapham v. Unemployment Compensation Bd., 103 Pa. Commw. 144, ———, 519 A.2d 1101, 1101 (1987).

which was relatively free of smoking employees.[139] She declined because it had been her experience that smoke from others would still infiltrate the work area despite the absence of smoking employees in the immediate vicinity.[140] The claimant voluntarily terminated her employment, and subsequently, her application for unemployment compensation was denied by the appropriate state agency.[141] On appeal, the Commonwealth Court of Pennsylvania reversed, holding that she had met her burden of showing necessitous and compelling cause for her termination.[142] In the process, the court wrote: "The evidence of the toxic nature of tobacco smoke and its injurious and deleterious effects on health is very strong, not only to the smokers, but also to the nonsmokers who are exposed to 'secondhand' smoke."[143] Interestingly, the court did not bother to cite a single source in support of this conclusion. When a court takes what amounts to judicial notice of these kinds of facts, claimants find meeting their burdens of proof much easier. This should result in more successful unemployment compensation claims for smoke-sensitive employees whose employers choose to allow smoking employees to dictate the quality of the workplace air.

INCREASED WORKERS' COMPENSATION COSTS

Toxic tort litigation has focused a great deal of attention on the workplace and concomitant workers' compensation issues in recent years. Asbestos-caused lung diseases account for a substantial amount of that litigation.[144] Because asbestos exposure causes damage similar to that caused by tobacco smoke,[145] and because

139. *Id.* at ———, 519 A.2d at 1102.
140. *Id.* at ———, 519 A.2d at 1102.
141. *Id.* at ———, 519 A.2d at 1101.
142. *Id.* at ———, 519 A.2d at 1102.
143. *Id.* at ———, 519 A.2d at 1102.
144. *See* Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 525 (Fla. Dist. Ct. App. 1985): "No other category of tort litigation has ever approached, either qualitatively or quantitatively, the magnitude of claims premised on asbestos exposure" (citations omitted). A 1981 study estimated that as many as 21 million living American workers have been exposed to asbestos. *Id.*
145. *See* Haskins, *The Tobacco Industry — A Contributor to Asbestos Disabilities*, 34 FED'N INS. COUNS. Q. 271 (1984):

> [S]moking is a significant causal factor in the development of cancer of the lung, mouth, larynx, pharynx, esophagus, and urinary bladder; coronary heart disease, stroke and aortic aneurysm; chronic bronchitis and emphysema; and several other diseases, including peptic ulcers. . . . [E]xposure to asbestos can cause lung cancer, oral cancer, cancer of the esophagus, stomach, colon and rectum; asbestosis; and mesothelioma. . . .

Id. at 280 (citations omitted). *But see* 134 CONG. REC. S12446 (daily ed. Sept. 14, 1988) (statement of Mr. Heinz):

> [H]ousehold radon causes as many as 20,000 lung cancer deaths each year.

the interaction of smoke and asbestos tends to exacerbate the harmful effects of both,[146] smoking has been identified as a separate workplace hazard.[147] That isolation has implications that extend beyond asbestos litigation, especially where involuntary smoking is concerned. For that reason, how asbestos manufacturer defendants have used smoking to their advantage is instructive.

Asbestos manufacturers have recognized the similarities between the diseases caused by smoking and those caused by asbestos.[148] Moreover, in an attempt to limit their liability for asbestos-related diseases, their primary target has been smoking.[149] Asbestos manufacturers argue that when both asbestos and

---

> Extrapolating from this year's testing, the E.P.A. estimated that among the 15 million homes in the seven states surveyed, about 200,000 had levels that exceeded the current health-protection standards for uranium miners.
>
> For people who spend 75 percent of their time in the house, that level poses a cancer risk equal to smoking more than a pack of cigarettes a day, the E.P.A. estimates.

Id. at S12447. As more studies become available which link cancer to an increasing number of factors, litigation resulting from cancer-related problems is certain to become more complex. The parties involved can anticipate lengthy suits and high legal costs.

146. *See, e.g.*, Building and Constr. Trades Dep't, AFL-CIO v. Brock, 838 F.2d 1258 (D.C. Cir. 1988): "[S]moking and asbestos have synergistic effects (i.e., the cancer risks of a smoking worker exposed to asbestos are greater than the mere sum of the risks of smoking and asbestos)." *Id.* at 1270; 51 Fed. Reg. at 22,616/1 (1987). *See also* Haskins, *supra* note 145:

> The inhalation of either cigarette smoke or asbestos fibers can increase a person's chance of contracting any one of a number of diseases. . . . Current epidemiological data indicates smoking and asbestos interact synergistically to produce lung cancer. A smoker who has been exposed to asbestos is approximately 90 times more likely to incur lung cancer than a nonsmoker who has not been exposed. A smoker who has been exposed to asbestos is approximately 30 times more likely to incur lung cancer than a nonsmoker who has been exposed. . . .

Id. at 280-83.

147. For a discussion of cigarette smoke as a hazard in the workplace, see *supra* notes 53-67, and accompanying text.

148. *See, e.g.*, Martin v. Owens-Corning Fiberglas, 515 Pa. 377, ———, 528 A.2d 947, 949 (1987) (medical evidence was insufficient to support apportionment of damages between asbestosis and emphysema resulting from cigarette smoking).

149. *Id.* at ———, 528 A.2d at 950. *See also* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573 (1983):

> [D]efendants have sought to bar or limit plaintiffs' recovery for asbestos-related diseases when the plaintiff is a cigarette smoker. Although the tobacco defense has not completely barred recovery by plaintiffs, the defense often has precipitated a dramatic reduction in the damages awarded.

Id. at 631-32 (citations omitted). *See also* 134 CONG. REC. E2290 (daily ed. July 7, 1988) (statement of Rep. Waxman):

> Epidemiologic studies and statistics simply do not support [the] . . . position that industrial chemicals and runaway modern technologies are producing an epidemic of cancer in this country. Although occupational exposures are an important cause of certain cancers (for example, respiratory and bladder cancer among men in certain high risk occupations), the total number of cancers from such exposures account for only a small fraction of the total cancer deaths that occur annually in the U.S. for these sites. Reports of the Surgeon General and other

smoke are present, the diseases which may be the result of exposure to either cannot be attributed to asbestos alone.[150] This defense was initially raised against asbestos plaintiffs who smoked.[151] The result has been an apportionment of the fault between the manufacturer and the smoker.[152]

The effect of this is two-fold. First, the resourcefulness of asbestos manufacturers has generated a wealth of data, further supporting the conclusion that smoke in the workplace is harmful.[153] Second, as suits by non-smoking employees against employ-

---

scientific organizations generally hold that cigarette smoking accounts for approximately 90 percent of all lung cancer deaths annually among males. Further, more recent evidence on environmental tobacco smoke (ETS) indicates that ETS exposure may account for an estimated 10 to 50 percent of the nonsmoking lung cancer deaths among males and females annually in the United States.

Id. at E2293.

It is clear that occupational carcinogens and carcinogenic community air pollutants do place individuals so exposed at increased risk for lung and other types of cancer. These risks, however, are small compared to risks from other exposures. A number of recent reports published by NCI [National Cancer Institute] and Environmental Protection Agency (EPA) epidemiologists should lead to a better understanding of the risks involved. For example, two studies conducted for the EPA have produced estimates of new cancer cases resulting from various air pollutants in our general environment. In 1985 EPA estimated that approximately 1300 to 1700 new cancer cases resulted from volatile organic and other carcinogens from both stationary and nonstationary sources. More recently (1987) the EPA examined, in detail, specific contributions of motor vehicles to cancer and estimated that between 385 and 2,286 new cancers resulted annually. Obviously, the contribution of air pollution from stationary and nonstationary sources to the total of cancer burden, even if the highest figures are used, only results in small numbers of new cancers each year. In contrast, active smoking is responsible for an estimated 30 percent of all cancer mortality annually and the National Academy of Sciences and other scientists have estimated that up to 5,000 or 6,000 lung cancers annually could be attributed to exposure of nonsmokers to environmental tobacco smoke. Indeed this environmental tobacco smoke contains thousands of chemical compounds including known carcinogens at levels many times those allowed in the workplace by OSHA.

Id. at E2294. *Cf.* Building & Constr. Trades Dep't v. Brock, 838 F.2d 1258 (D.C. Cir. 1988):

But § 6(b)(5) calls on OSHA to set standards such that "no employee" will experience the forbidden level of risk. We understand the employers' aggravation that they are being forced to bear part of the burden imposed by employees' decisions to smoke, but we do not think that at this stage of American history smokers can be regarded as so far beyond the pale as to require OSHA to disregard them in computing the risks of asbestos.

Id at 1265.

150. *See* Special Project, *supra* note 149, at 631 (asbestos companies argue that "but for" smoking, lung cancer would not have been a significant health factor among those exposed to asbestos).

151. *Id.* at 631-32 (a plaintiff's smoking has decreased damages awarded from asbestos companies).

152. *E.g., Building & Constr. Trades*, 838 F.2d at 1258. *See also* Martin v. Owens-Corning Fiberglas, 515 Pa. 377, ———, 528 A.2d 947, 949 (1987) (asbestos and cigarette smoke caused a single indivisible injury, and each could be held fully liable for all the harm). *But see* Brisboy v. Fibrebord Corp., 429 Mich. 540, ———, 418 N.W.2d 650, 655 (1988) (the principles of comparative negligence are applicable in lung cancer cases where asbestos and smoking are both causes of the disease).

153. *See* Jenkins v. Halstead Indus., 17 Ark. App. 197, ———, 706 S.W.2d 191, 193

ers for injuries caused by ETS increase, asbestos manufacturers will use the presence of ETS as a defense when nonsmokers sue asbestos manufacturers for asbestos-caused diseases. In other words, not only will smokers' intake of tobacco smoke be an issue in asbestos cases, the amount of ETS exposure of a nonsmoking plaintiff will also be a defense. What will, however, distinguish these cases from the earlier cases is who ultimately bears the financial burden.

When the smoker's own conduct is all or part of the cause of the disease, the smoker's award may be reduced or the claim barred.[154] However, if the worker is a nonsmoker whose disease is caused in whole or in part by secondhand tobacco smoke in the workplace, relatively new and unsettled questions are raised. Assume a nonsmoker brings suit against an asbestos manufacturer and the manufacturer defends on the basis that the disease was the result of ETS in the workplace. Further assume that the manufacturer is partially successful in its defense. Who pays for that portion of the disease caused by the employee's exposure to ETS?[155] Some case law places the liability directly upon the employer.[156] The best an employer could hope for is that the claim would be covered by workers' compensation.[157] Ultimately, however, the employer bears the costs directly in negligence actions, or indirectly through higher workers' compensation premiums.[158]

(1986) (court decreased award by the percentage of causation attributable to smoking). *C.f.* Kellogg v. Workers' Compensation Appeals Bd., 26 Cal. 3d 450, 456, 161 Cal. Rptr. 783, 786, 605 P.2d 422, 425 (1980) (employer failed its burden of proving that apportionment was appropriate); Kingery v. Ford Motor Co., 116 Mich. App. 606, ———, 323 N.W.2d 318, 323 (1982) (plaintiff's pulmonary disease was caused by smoking as well as occupational hazards, and therefore no apportionment was allowed).

154. *See* Walston v. Burlington Indus., 304 N.C. 670, ———, 285 S.E.2d 822, 826 (1982) (claim was barred when plaintiff failed to carry burden of proof in establishing that disease was related to occupational hazards and not plaintiff's own conduct).

155. *See* Parodi v. Merit Sys. Protection Bd., 690 F.2d 731, 739 (9th Cir. 1982) (a smoke-sensitive federal employee who experienced pulmonary difficulties after being transferred to an office in which many employees smoked was entitled to disability benefits until such time as her employer provided her with a smoke-free workplace).

156. *See* McCarthy v. Department of Social & Health Servs., 110 Wash. 2d 812, 759 P.2d 351 (1988). McCarthy had developed a disabling pulmonary lung disease as a result of her constant exposure to tobacco smoke in the workplace and was forced to terminate her employment because of it. *Id.* at ———, 759 P.2d at 352. Her workers' compensation claim was denied on the ground that her pulmonary lung disease was not the result of an industrial injury, nor did it constitute an occupational disease under Washington law. *Id.* at ———, 759 P.2d at 352. She then brought a common law negligence action against her employer, alleging that the employer breached its duty to maintain a safe workplace. *Id.* at ———, 759 P.2d at 352. The Supreme Court of Washington held that her complaint stated a claim against her employer. *Id.* at ———, 759 P.2d at 353. For additional discussion of *McCarthy*, see *supra* notes 54-58 and accompanying text.

157. For a discussion of worker's compensation and ETS, see *supra* note 48 and accompanying text.

158. An employer caught up in asbestos/ETS workers' compensation suits may find that there are no asbestos-product manufacturers with whom to share the costs of

RETALIATORY DISCHARGE

As the number of employees who become informed about the hazards associated with ETS increases, so will the number of those among them who complain about ETS in the workplace. The law recognizes their right to complain,[159] and an increasing number of employers who discharge employees who too strongly voice their complaints about ETS will find themselves sued for retaliatory discharge.[160] Moreover, it will be argued that those who do not discharge complaining employees, but who also do not eliminate ETS, are nevertheless constructively firing the employee who terminates the employment rather than risk contracting one of the dreaded diseases ETS can cause.[161]

---

asbestos/ETS-caused diseases. Some of them have already filed bankruptcy. *See* Comment, *Apportionment of Insurance Coverage in Asbestosis Cases: Coverage, Coverage, Who's Got the Coverage?*, 27 SANTA CLARA L. REV. 135, 135 (1987) (the flood of asbestos cases may bankrupt many asbestos companies and their insurers). Moreover, with a latency period for asbestosis estimated at 24-40 years, some of the injuries will not show up until well into the 21st century. *Id.* at 135 n.2.

159. *See* Swain, *Protecting Individual Employees: Is It Safe to Complain About Safety?*, 9 U. BRIDGEPORT L. REV. 59 (1988). *See also* Occupational Safety and Health Act (OSHA), Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 657(f) (1982)) (any employees or employees' representative who believes that a violation of a safety or health standard exists may request an inspection).

160. Note, *Remedies for Employer's Wrongful Discharge of an Employee of an Indefinite Duration*, 21 IND. L. REV. 547 (1988). To state a claim for retaliatory discharge, the employee must show (1) that he/she sought to or did exercise a personal right or public obligation or refused to commit an unlawful act, (2) that arose out of a sufficiently important public policy interest, and (3) that the employer discharged the employee (4) because the employee sought to or did exercise the personal right or public obligation or refused to do the unlawful act. *Id.* at 565-66.

An employee discharged for refusing to work where ETS is allowed could show that avoiding the health hazards caused by ETS is an important public policy interest, and that he/she was exercising a personal right not to be exposed to smoke. If retaliatory discharge is proven, the employee can receive remedies of contract damages, reinstatement, compensatory, and even punitive damages. *Id.* at 571-586. *See also* Hentzel v. Singer Co., 138 Cal. App. 3d 290, 304, 188 Cal. Rptr. 159, 168 (1982) (plaintiff's complaint for retaliatory dismissal due to his protests over tobacco smoke in the work area stated a cause of action). Hentzel complained about ETS in the workplace. *Id.* at 293, 188 Cal. Rptr. at 160. He was fired and brought an action against Singer Co., alleging, among other claims, the tort of wrongful discharge. *Id.* at 293, 188 Cal. Rptr. at 160. The California First District Court of Appeal found he had stated a cause of action. *Id.* at 304, 188 Cal. Rptr. at 168. *But cf.* Gordon v. Raven Sys. & Research, Inc., 462 A.2d 10 (D.C. 1983). Gordon was fired for insubordination because she refused to work in a work group that contained smokers. *Id.* at 11. She sued for wrongful termination but was unsuccessful. *Id.* at 12. A different result could be expected today. *See* McCarthy v. Department of Social & Health Servs., 101 Wash. 2d 812, 759 P.2d 351 (1988). McCarthy had complained to her supervisors that her constant exposure to cigarette smoke was harming her health. *Id.* at ———, 759 P.2d at 352. Her supervisors failed to take steps to correct the situation and her subsequent illness forced her to quit. *Id.* at ———, 759 P.2d at 352. She sued for negligent failure to provide a safe workplace. *Id.* at ———, 759 P.2d at 352. The Washington Supreme Court held that McCarthy had stated a cause of action and the case was remanded for trial on the merits. *Id.* at ———, 759 P.2d at 358. For a discussion of *McCarthy*, see *supra* notes 54-58 and accompanying text. For another discussion of retaliatory discharge, see Cosgrave & Zwick, *Identifying Public Policy in Retaliatory Discharge Cases in Illinois*, 76 ILL. B.J. 506 (1988).

161. *Cf.* McCrocklin v. Employment Dev. Dep't, 156 Cal. App. 3d 1071, 205 Cal. Rptr. 156 (1984). McCrocklin objected to the carcinogenic effect of breathing ETS and quit his

INFLICTION OF EMOTIONAL DISTRESS

Negligent infliction of emotional distress[162] is a tort theory ETS-sensitive persons can use against managers who have a duty to provide an ETS-free environment but who fail to do so.[163] It would seem all managers of public and private places open to the public should become more concerned about this tort.

Employers, on the other hand, may enjoy some protection from negligent infliction of emotional distress claims brought by employees.[164] However, employers and all other managers are subject to claims by the public and by employees for the intentional infliction of emotional distress.[165] An employer ordering a

---

job rather than be subjected to ETS. *Id.* at 1070, 205 Cal. Rptr. at 157. He subsequently applied for unemployment compensation benefits. *Id.* at 1071, 205 Cal. Rptr. at 157. The California Court of Appeals awarded them to him, and in the process quoted from *Amador v. Unemployment Insurance Appeals Board. McCrocklin*, 156 Cal. App. 3d at 1074, 205 Cal. Rptr. at 160. *See* Amador v. Unemployment Ins. Appeals Bd., 35 Cal. 3d 671, 677 P.2d 224, 200 Cal. Rptr. 298 (1984). The court in *Amador* stated:

> [I]t can no longer be maintained that a "diligent" worker is one who blindly follows his or her employer's orders regardless of the potential consequences. The health hazards of the modern work environment — to employees, consumers, and the population at large — are serious and widespread, and the record of employers in controlling those hazards does not inspire such confidence that a reasonable worker can be expected to trust invariably his or her employer's judgment.

Id. at 683, 677 P.2d at 231, 200 Cal. Rptr. at 305.

162. Damages for emotional distress are recoverable when the distress is the result of: (1) physical injury; (2) physical impact; (3) location within the zone of danger; or (4) witnessing a traumatizing event involving a close relative. *See* Merry v. Westinghouse Elec. Corp., 684 F. Supp. 847, 852 (M.D. Pa. 1988).

163. The duty to provide an ETS-free environment would most likely come from a statute, an ordinance, or some other law. These laws are passed in part to protect the many smoke-sensitive people in America (estimated to number between 34,000,000 and 51,000,000, see *infra* note 179). Should a manager who is required under the law to eliminate ETS not do so, and a smoke-sensitive person is consequently harmed, the smoke-sensitive person has a clear claim for the harm and for the emotional distress caused by the contact. Examples of ETS-related harm might be an asthma attack or an allergic reaction. Somewhat less clear is whether one who comes in contact with ETS, but suffers only emotional distress, would have a claim. Here, the result might depend upon whether inhaled ETS causes a "physical impact" of the type that will support the negligent infliction of emotional distress claim. Research has not uncovered a case that holds that ETS does cause such physical impact. It has been held, however, that the ingestation of contaminated water into the human body, inhalation and retention of asbestos particles, and exposure to tubercle bacilli are all sufficient physical impacts to permit recovery for the negligent infliction of emotional distress. Merry v. Westinghouse Elec. Corp., 684 F. Supp. 847, 852 (M.D. Pa. 1988) (citations omitted). Particles of ETS loaded with carcinogens cannot be far behind.

164. Because this is "negligent" conduct, workers' compensation laws may provide some protection. *See* N.D. CENT. CODE § 65-01-01 (1985) (providing for relief to worker and worker's family regardless of fault); Pace v. North Dakota Workmens' Comp. Bureau, 51 N.D. 815, ———, 201 N.W. 348, 350 (1915) (workmens' compensation is a remedy for all cases, including negligence where employee would have an action at law against the employer).

165. The Restatement (Second) of Torts defines intentional infliction of emotional distress as:

> § 46. Outrageous Conduct Causing Severe Emotional Distress
> (1) One who by extreme and outrageous conduct intentionally or recklessly

nonsmoker to work in an ETS-polluted area in order to harass the employee into giving up a job might be an example. Another example is the seating of a known smoke-sensitive person in a highly ETS-polluted part of a restaurant.

Until recently, the great majority of people who did not smoke assumed they were avoiding the high risk of contracting the dreaded diseases that smokers assumed. Now they are told that working with smokers all these years has subjected them to essentially the same risks.[166] Understandably, many nonsmokers are disturbed to learn that "smokers' diseases" may be in their future. They may also have claims against those who created the condition that exposed them to this increased risk of disease and the consequential mental distress.

Consider cancerphobia, defined as "a phobic reaction or apprehension that one experiences due to a fear of contracting

---

causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

RESTATEMENT (SECOND) OF TORTS § 46 (1963).

166. *See* Collishaw, Kirkbridge & Wigle, *Tobacco Smoke in the Workplace: An Occupational Health Hazard*, 131 CAN. MED. ASS'N J. 1199 (1984). It has been estimated that 63% of the labor force in the United States is exposed to tobacco smoke in the workplace. *Id.* at 1199. Consider the following excerpts:

> The toxic substances in tobacco-smoke-polluted air are inhaled and, to varying degrees, absorbed by exposed nonsmokers. Tobacco smoke, both sidestream and mainstream, is a concentrated aerosol of very small particles. . . . It has been predicted that 30% to 40% of these particles will deposit in alveolar regions and 5% to 10% in the tracheobronchial region. Such particles contain many known carcinogens; they may be engulfed by macrophages [white blood cells] or transported to regional lymph nodes and may take days to months to clear from the lungs.

Id.

> Eye irritation, the most common complaint of healthy people exposed to tobacco smoke, and the rate of eye blinking increase with increasing amounts or duration of exposure to smoke.

Id. at 1200.

> The symptoms reported by nonsmokers exposed to tobacco smoke include eye irritation, nasal congestion, headache, cough, sore throat, hoarseness, nausea, dizziness, "general annoyance," loss of appetite, and Raynaud's phenomenon [intermittent loss of circulation to the extremities].

Id.

> A study of 2100 adults revealed impairment of small-airways function in nonsmokers who were employed for at least 20 years in enclosed work areas where smoking was permitted. *The loss of function was equivalent to that in persons who smoked up to 10 cigarettes per day and is sufficient to produce serious damage.*

Id. (emphasis added).

cancer in the future."[167] Courts seem increasingly willing to recognize this form of mental distress,[168] paving the way for its application to the mental distress suffered by a nonsmoker who is exposed to secondhand smoke.[169]

ASSAULT AND BATTERY

The traditional torts of assault and battery have great potential as claims for nonsmokers who are subjected to ETS contact. As suggested earlier in this article, contact with smoke is no longer considered innocuous contact. Rather, it is offensive or harmful contact, and as such satisfies an essential element of the two torts.[170]

---

167. Ferrara v. Galluchio, 5 N.Y.2d 16, 19, 152 N.E.2d 249, 251, 176 N.Y.S.2d 996, 998 (1958).

168. *See* Gale & Goyer, *Recovery For Cancerphobia and Increased Risk of Cancer*, 15 CUMB. L. REV. 723 (1985):

> Cancerphobia is a potential claim in an increasing number of tort actions, as more substances are linked with cancer each year. To date, however, the subject has arisen primarily in three areas: medical malpractice cases, DES cases, and asbestosis cases. Courts having considered cancerphobia almost uniformly have allowed it.

Id. at 730 (citations omitted). *See, e.g.*, Hagerty v. L. & L. Marine Serv., Inc., 788 F.2d 315, 318 (5th Cir. 1986) ("plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and causally related to the defendant's negligence").

169. The asbestos cases provide an analogous situation. *See, e.g.*, Lavelle v. Owens-Corning Fiberglas Corp., 30 Ohio Misc. 2d 11, ———, 507 N.E.2d 476, 481 (C.P. 1987):

> A real distinction can be drawn between the possibility of recovery for increased risk of cancer and that for increased fear of cancer ('cancerphobia'). . . . Cancerphobia is a claimed present injury consisting of mental anxiety and distress over contracting cancer in the future, as opposed to risk of cancer, which is a potential physical predisposition of developing cancer in the future.

Id. at 480.

The "DES Daughter" cases provide another analogy to ETS-related cancerphobia. *See* Wetherill v. University of Chicago, 565 F. Supp. 1553 (N.D. Ill. 1983) (memorandum opinion and order on motions *in limine*). In *Wetherill*, District Judge Shadur stated: "Though neither plaintiff now suffers from any cancerous or pre-cancerous condition, each believes her prenatal exposure to DES will significantly enhance the likelihood of contracting cancer in the future. Each seeks damages for her fear of developing cancer, not for the increased risk itself." *Id.* at 1559. For a discussion of pregnant women and involuntary smoking, see *supra* notes 68-74 and accompanying text, and Comment, *Emotional Distress Damages for Cancerphobia: A Case for the DES Daughter*, 14 PAC. L.J. 1215 (1983).

170. RESTATEMENT (SECOND) OF TORTS § 21 (1965). "An actor is subject to liability to another for *assault* if . . . he acts intending to cause a *harmful* or *offensive* contact with the person of the other or a third person, or an imminent apprehension of such conduct. . . ." *Id.* "An actor is subject to liability to another for *battery* if . . . he acts intending to cause a *harmful* or *offensive* contact with the person of the other or a third person, or an imminent apprehension of such contact. . . ." *Id.* at § 13. "Offensive contact will not support a negligence action, but harmful contact will." *Id.* at § 18(2).

The Restatement (Second) of Torts provides these relevant definitions:

> *Bodily harm* is a physical impairment of the condition of another's body, or physical pain or illness.

RESTATEMENT (SECOND) OF TORTS § 16 (1965) (emphasis added).

> A bodily contact is *offensive* if it offends a reasonable sense of personal dignity.

Because these are intentional torts, merely allowing an ETS-polluted area to exist is probably not enough in the way of culpability to make most employers or managers liable under an assault or battery theory.[171] Nonsmoking employees, however, will sue smoking employees, and nonsmoking customers will sue smoking customers, so employers and other managers will find themselves at least indirectly involved in assault and battery lawsuits.[172]

THE BOTTOM LINE

Millions of Americans cannot enter buildings contaminated by ETS.[173] That means they cannot shop, participate in public gatherings, or work in those buildings. Armed with a mountain of evi-

---

Id. at § 19.

> In order that a contact be *offensive* to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be *a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.*

Id. at § 19 comment a (emphasis added).

"Harmful" contact, then, is actionable in the torts negligence, battery, and assault. "Offensive" contact is actionable in the torts battery and assault, but not negligence. "Innocuous" contact is actionable in none of them.

"Harmful contact" is defined as any physical impairment of the condition of another's body, or physical pain or illness. RESTATEMENT (SECOND) OF TORTS § 15 (1965). Thus, tobacco smoke can be "harmful contact" to many smoke-sensitive people who come in contact with it.

The Restatement (Second) of Torts defines "offensive contact" as contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted. *Id.* at § 19 comment a. Tobacco smoke is becoming increasingly offensive to the general public, as evidenced by the increase in the number of areas in which smoking is prohibited. For many, it is clearly "offensive contact."

Research has not disclosed a case where tobacco smoke is held to be "harmful" or "offensive" contact. However, the ingestion of contaminated water into the human body, inhalation and retention of asbestos particles, and exposure to tubercle bacilli have all been held to be sufficient "impacts" to permit recovery for the negligent infliction of emotional distress. *See* cases cited *supra* note 163. By analogy, smoke particles, too, can cause an "impact," and "impact" as used here is a "contact."

171. Managers should, however, foresee that smokers will intentionally pollute the nonsmokers' environment, and if those managers have a duty to prevent that from happening, they are probably negligent when they fail to do so. The legal theory of manager liability, however, is negligence, not assault or battery.

172. *See* Ricci v. American Airlines, 226 N.J. Super. 377, ———, 544 A.2d 428, 431 (N.J. Super. Ct. App. Div. 1988) (court took notice that nonsmokers are becoming increasingly concerned and militant about the dangers of ETS). The court in *Ricci* found it reasonably foreseeable that when nonsmokers are forced to endure smoker's passive smoke, conflicts may arise. *Id.* at ———, 544 A.2d at 431. Parties who fail to foresee and guard against such conflicts may be found negligent and held liable for the resulting damages or injuries. *Id.* at ———, 544 A.2d at 432. Thus, the potential for employers to become directly involved in such suits is very real.

173. One study found that 21% of Canadians have a health condition, such as heart disease, acute respiratory disease, emphysema, asthma, or hayfever, that is aggravated by ETS. *Smoking and Health — 1987 Update*, 136 CAN. MED. ASS'N J. 1104A (1987). Assuming 21% of America's 243,249,000 population (STATISTICAL ABSTRACT OF THE UNITED STATES 7 (108 ed. 1988)) are affected by ETS, an estimated 51,082,290 Americans would be included in this group. The American Medical Association puts the number of smoke-sensitive individuals at 34 million. Note, *Florida Nonsmokers Need Legislative Action to*

dence proving that ETS is hazardous, many of them, their relatives and friends, and their doctors are appearing before legislative bodies asking that those buildings be as open to them as they are to the rest of the general population. Legislators all over the country are responding by making it the duty of persons in control to provide that access. It seems inevitable that a wave of lawsuits against those who ignore that duty will follow.[174]

The court system is responding to the evidence.[175] Thus, it is no longer a question of whether all worksites and all buildings open to the public will be smoke-free,[176] but when.[177] The man-

---

"Clear the Air", 8 NOVA L.J. 389, 397 (1984). Some are children with asthma, a disease described by one columnist as

> a disease of the respiratory tract in which the airways constrict, drastically reducing the flow of air into and out of the lungs. Patients liken it to trying to breath through a straw. In most children with asthma, the symptoms are precipitated by exposure to an allergen or irritant, such as tobacco smoke. . . .

Brody, *Myths About Asthma Threaten Health of Child Sufferers*, Star Tribune, Oct. 9, 1988, at 2E, col. 1.

> More than 8 million children have asthma attacks and more than 2 million suffer from asthma nearly all the time. Many other children are believed to have the disease, but it has not been properly diagnosed. Asthma is the leading cause of absenteeism from school and one of the 10 most frequent reasons for visits to pediatricians. . . .
>
> Parents . . . must help the child identify and avoid the allergens and irritants to which the child is sensitive, especially tobacco smoke and furry or feathery pets.

Id.

A Canadian study shows asthma in children to be on the rise, and suggests that the cause is increased smoking by women. *See* Mao, Semenciw, Morrison, MacWilliam, Davis & Wigle, *Increased Rates of Illness and Death from Asthma in Canada*, 137 CAN. J. MED. 620, 621-23 (1987):

> The rates of hospital admissions increased by over 50% for both sexes between 1970-72 and 1980-82. The largest increases occurred among those aged less than 25 years, particularly those below age 15. . . . Rates of death from asthma increased by 9% for males and 44% for females between 1970-72 and 1982-84. . . . Dramatic increases were noted among those aged 15 to 25 and 25 to 35 years. . . . [T]obacco smoke aggravates asthma. . . . [T]he average number of cigarettes smoked per smoker per day increased by over 50% among women 24 to 43 years of age between 1969 and 1981. . . . These women would have included many of the mothers of children under age 15, the age range for which hospital admission/separation rates increased the most.

Id. at 621-23.

174. *See* cases cited *supra* note 45.

175. *See supra* notes 53, 57-58; *see also infra* note 176.

176. Courts, state legislatures, federal agencies, Congress, and businesses have not only reacted to public pressure to restrict smoking, but have recently begun to initiate action independently. Courts now take judicial notice of smoking's harmful effects. *See* cases cited *supra* notes 53, 57-58. Moreover, at least one court has noted that it is reasonable to expect a militant reaction from nonsmokers when smokers pollute their shared airspace. *Ricci*, 226 N.J. Super. at ———, 544 A.2d at 431. Since the first state Clean Indoor Air Act in 1976, there has been a veritable explosion of similar legislation restricting smoking. *See* Note, *supra* note 12, at 175-82 (providing a comprehensive listing of state legislative enactments which restrict or ban smoking in public and private places); 41 C.F.R. § 101-20.105-3 (1987) (regulations for controlling smoking in federal buildings); Health Promotion, 53 Fed. Reg. 33, 123 (1988) (to be codified at 32 C.F.R. § 85) (establishing a policy on smoking in Department of Defense occupied buildings and facilities); 14 C.F.R.

ager disinclined to accept this eventuality should expect to add litigation costs to the already staggering costs of this nation's tobacco addiction.

The high costs of the nation's mammoth tobacco addiction are well documented.[178] It costs the smoker;[179] it costs the smoker's

---

121, 135 (FAA 1988) (regulations concerning smoking on airplanes). Congress has acted to reduce the effects of smoking and continues to act to rid institutions of ETS. *See supra* note 46; 134 CONG. REC. E3114 (daily ed. Sept. 27, 1988) (statement of Rep. Durbin introducing the Smoke-Free Hospitals Act). Finally, businesses across the country, for a myriad of reasons, have chosen to attack the problem of smoke head on. Some businesses simply separate smokers and nonsmokers, an adjustment which is overwhelmingly supported by both smokers and nonsmokers. *See No-Smoke Motel*, Austin American-Statesman, Dec. 20, 1987, at E2, col. 2. Others, insurance companies for example, offer discount-based incentive plans of up to 50% to entice smokers to kick the habit. Cowell, *An Insurance Company Perspective on Smoking*, N.Y. ST. J. MED., July 1985, at 307. Still others ban smoking by workers altogether. "USG has told its workers they will not be allowed to smoke on the job, or anywhere else. . . . USG will not hire smokers. . . . Should smokers' health profiles fail to improve — an indication they are sneaking cigarettes at home — they may be fired. . . ." *Cold Turkey*, TIME, Feb. 1, 1987, at 32. *See also* Rolland & Dushman, *A Burning Issue on the Job and Off*, NEWSWEEK, Jan. 13, 1986, at 9:

> The Corporation [which author Rolland heads] took a deep breath of clean air last week and went cold turkey. Now we provide a smoke-free environment. One recent report estimates that smokers utilize the health-care system at least 50% more than nonsmokers; they waste 30 minutes each workday fumbling with matches and lighters, sucking seductive poisons. If time is going to be wasted, I'd rather it be frittered away on daydreams and chatter than flicked into a valley of ashes. Furthermore, smoking may not be a victimless vice. We are not trying to dictate personal lifestyles. We encourage our employees to stop smoking altogether, but they cannot smoke on the job. We simply can't afford their habit. This isn't a crusade. This is a business decision. Scores of employers . . . won't hire them [smokers]. It doesn't matter if the employees do not smoke during working hours or if they limit their smoking to the privacy of their homes. If they smoke at all, they won't be hired. . . . [T]he chairman of Goodyear . . . has predicted that "we'll get to the point where nonsmoking is a condition of employment." Rada Electric in Seattle is one such firm. At others, nonsmokers are given preference in hiring and promotion.

Id. at 9.

177. The North Dakota State Department of Health has as a goal tobacco-free worksites by the year 1990. NORTH DAKOTA STATE HEALTH DEPARTMENT, TOBACCO, HEALTH, AND THE BOTTOM LINE 98 (1986).

178. *See* Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL L. 317 (1987). *But see Notebook*, 3 PHILIP MORRIS MAGAZINE 20 (1988) (hereinafter *Notebook*):

> Cigarettes are the most heavily taxed product in the United States. . . . [N]early 40 percent of the price you pay for a pack of cigarettes is the result of tobacco excise taxes. . . . In 1986, Minnesota smokers paid more than $202 million. And, smokers in Texas paid more than $761 million in cigarette excise taxes. . . . Find out who's picking your pocket . . . and what they're doing with your money.

Id.

If we assume cigarettes cost $1.00 per pack in 1986, then 505,000,000 packs of cigarettes were sold in Minnesota and 1,902,500 packs were sold in Texas that year. Inasmuch as the indirect costs of smoking have been estimated at $2.17 per pack (see *infra* note 181), Americans paid out an additional $1,095,850,000 to support 1986 nicotine addiction in Minnesota and $4,128,425,000 to support 1986 nicotine addition in Texas. The taxes collected from smokers in these two states ($202,000,000 in Minnesota and $761,000,000 in Texas) pale by comparison.

179. Each year cigarette-related illnesses result in the deaths of approximately 350,000 Americans. Blasi & Monaghan, *The First Amendment and Cigarette Advertising*, 256 J. AM. MED. ASS'N 502 (1986). Three main categories of diseases are associated with cigarette

family;[180] it costs society as a whole;[181] and it is particularly costly

---

smoking: cancers, cardiovascular disease, and chronic obstructive lung diseases. 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at 11. Cigarette smoking is a leading cause of cancers of the lung, respiratory tract, pancreas, and urinary bladder. 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 6. Smoking increases the risks for several cardiovascular diseases, principally coronary heart disease. Comment, *Tobacco Under Fire*, 36 CATH. U.L. REV. 643, 643 n.2 (citing the 1983 Surgeon General's Report). Smoking increases the risks for sudden cardiac death, stroke, and other cardiovascular diseases such as atherosclerotic vascular disease. 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at 11. Cigarette smoking is the primary cause of chronic obstructive lung diseases, including chronic bronchitis and emphysema. *Id.* at 603. About 130,000 of the annual smoking-related deaths in the United States are attributable to cancer. 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 8. The Surgeon General has stated that "cigarette smoking is the chief, single, avoidable cause of death in our society and the most important public health issue of our time." 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at iii. A recent study has even linked smoking and impotence. *Study Links Smoking, Impotence*, Grand Forks Herald, May 3, 1987, at 2A, col. 6. *See also* 134 CONG. REC. E2290 (daily ed. July 7, 1988) (statement of Rep. Waxman):

> [N]ew studies, added to thousands of previously published reports on the correlation between tobacco use and increased cancer morbidity and mortality, firmly establish that chronic tobacco use, particularly cigarette smoking, is the largest single cause of excess cancer mortality not only for the U.S. population but in those cultures around the world where smoking has become an established behavior for a significant proportion of the population. Thus, in the United States tobacco use is directly responsible for approximately 40% of all male cancer deaths and nearly 20% of female cancer deaths. Overall this translates to approximately 140,000 preventable cancer deaths in the U.S. population in 1987. Not even discussed here are the great number of deaths from heart and lung disease caused by cigarette smoking.

Id. at E2296.

One study has determined that a man who begins smoking one pack of cigarettes per day at the age of 25 will decrease his life expectancy by 5.5 years. Note, *supra* note 12, at 135. The same man who smokes two packs a day will decrease his life expectancy by 8.3 years. *Id.* Moreover, smoking-caused death does not come easily, although it is sometimes the answer to a prayer. *See, Desi Arnaz Dies of Cancer*, Grand Forks Herald, Dec. 3, 1986, at 5A, col. 2:

> Arnaz's doctor . . . said the musician-actor "died of lung cancer. It was from smoking those Cuban cigars. . . ." [Lucille Ball said] "Mr. Arnaz had been ill with cancer for many months and my family and I have been praying for his release from this terrible ordeal. . . ."

Id. at 5A, col. 2.

180. If a parent who daily smokes 1 1/2 packages of cigarettes costing $1.50 per pack were to quit smoking on the day his or her child is born, and instead of buying cigarettes invested each day $2.25 at 8% interest, when the child reached 18, the parent would have over $30,000 after tax dollars to apply towards the child's college education.

In addition, the parent would increase the odds of sending a healthy child to college. See *supra* note 173 for a discussion of the effect of parental smoking on children. The risk to children, however, goes well beyond future health. Data indicates that a pregnant woman smoker increases the risk of miscarriage by as much as 30 percent. Note, *supra* note 12, at 137 n.20. Therefore, even before birth, smoking is a life and death matter for the children of smokers.

Spouses would also benefit if their smoking partners stopped smoking. A study conducted for fourteen years and involving 91,540 nonsmoking Japanese housewives examined the effect of tobacco smoke on the nonsmoker in the house. Comment, *Nonsmokers' Rights: The Employer's Dilemma*, 28 ST. LOUIS U.L.J. 993, 997 (1984). The women were at least forty years old at the start of the study. *Id.* Of these women, 25,416 were married to men who smoked at least twenty cigarettes per day and 44,184 to men who smoked less than twenty cigarettes per day (the remaining 21,940 women were married to nonsmokers). *Id.* The results of the study indicated that although the smoking habits of the husband had no significant effect on the incidence of most other diseases

contracted by the wives, the variance in a husband's smoking habits could double the mortality rate for lung cancer in nonsmoking housewives. *Id.* at 998.

181. Cigarette smoking has a massive social cost. Blasi & Monaghan, *supra* note 179, at 502. In the United States the medical care and lost productivity costs associated with cigarette smoking total approximately $65 billion per year. *Id.* As of 1980, aggregate increased lifetime smokers' medical costs for lung cancer, coronary heart disease, and emphysema are estimated at $500 billion. Rice, *The Economic Costs of the Health Effects of Smoking*, 64 MILBANK Q., 489, 501-02 (1986). Financial costs associated with smoking include an estimate that the United States health care system will spend between $12 billion and $35 billion yearly to treat smoking-related diseases. Note, *supra* note 12, at 137 (quoting the Office of Tech. Assessment, Staff Memo: Smoking-Related Deaths and Financial Costs, at 1-3 (1985)). The middle estimate of $22 billion translates into about 72 cents per pack of cigarettes sold in the United States. *Id.* It is estimated that the cost of lost productivity associated with smokers ranges between $27 billion and $61 billion with a middle estimate of $43 billion. *Id.* That figure equals approximately $1.45 for each pack of cigarettes sold. *Id.* Therefore, the total (middle estimate) costs of health care and lost productivity equal $65 billion or $2.17 per pack. *Id.*

Nonsmokers indirectly subsidize smokers by way of disability benefits. *Id.* at 138. Smokers are sick more often and miss more days of work. *Id.* n.25. Insurance companies estimate that smokers cost their employers an average of $300 more in insurance claims than nonsmokers. *Id.* Smokers are absent from work 50 percent more often than nonsmokers. *Id.* (citing New York Times, Oct. 1, 1985, at D2, col.1). Smokers use health care systems 50 percent more than nonsmokers. *Id.* (citing N.Y. Times, Mar. 14, 1985, at B1, col. 6). When a smoker dies prematurely, his family may receive survivors' or other benefits under social welfare programs, benefits which nonsmokers do not realize to the same degree. *Id.* at 138.

Another financial cost associated with smoking is the destruction of property. *Id.* A large percentage of house fires are caused by negligent smokers. *Id.* n.28. In addition, the results of such fires are often extremely costly in human terms. *See Cigarette Starts Killer Duplex Fire*, Grand Forks Herald, Nov. 7, 1986, at 6B, col. 4 (duplex fire that killed eight people was caused by a discarded cigarette that ignited a couch); Ranii, *Tobacco's Legal Road — Non-Smokers Get Fired Up*, NAT'L L.J., Apr. 9, 1984, at 10, col.3: ("Cigarettes are the top cause of fire deaths in the country").

Smokers who drive are involved in more than twice as many automobile accidents than are nonsmokers. *See* Note, *supra* note 12, at 138 n.29. Rooms where smoking is permitted require greater maintenance than rooms in which smoking is prohibited. *Id.* at 139 n.30 (citing New York Times, Mar. 14, 1985, at B6, col.6, an article about an insurance company which employs 2000 persons, and which banned smoking. Three months later it received a $500 per month rebate from its janitorial service; the service no longer had to clean ashtrays, and other cleaning was easier.).

"[I]n 1985, the United States health care system spent an estimated $22,000,000,000 to treat smoking-related diseases, of which the Federal government paid about $4,200,000,000 while lost productivity costs due to smoking-related illness and premature death were $43,000,000,000." Comment, *Tobacco Under Fire: Developments in Judicial Responses to Cigarette Smoking Injuries*, 36 CATH. U.L. REV. 643, 645 n.11 (1987).

Indirect costs of smoking include more lost work days for smokers than for nonsmokers, with 19% of days lost from work related to smoking. Rothstein, *Refusing To Employ Smokers: Good Public Health or Bad Public Policy?* 62 NOTRE DAME L. REV. 940, 945 (1987). Smokers have an injury rate twice that of nonsmokers due to loss of attention, coughing, and similar distractions. *Id.* at 946.

North Dakota is no stranger to the high cost of this country's cigarette addiction. The individual tragedy often reaches out to touch us all, and becomes society's loss. *See N.D. Lost Remarkable Servant with Death of Lt. Gov. Meiers*, Grand Forks Herald, Mar. 20, 1987:

> Her courage in the face of her cancer brought her much admiration, and quite a bit of publicity. She was featured in USA Today and on CBS Morning News. She used these appearances for a new campaign, this one against smoking, which contributed to her cancer and her death. Meiers was a remarkable public official and an admirable private person. We all will miss her.

Id. at 4A, col. 1.

Vast amounts of money are spent yearly to research ways of preventing and treating all forms of cancer. *See* 134 CONG. REC. E2290 (daily ed. July 7, 1988) (statement of Rep.

to the business community.[182]

The smoker and the smoker's family are at the mercy of an addictive killer drug.[183] Congress is at the mercy of a political system that places tobacco producer interests ahead of the public good.[184] However, several of the national disease associations, public interest organizations such as GASP (Group Against Smok-

---

Waxman). The National Cancer Institute (NCI) has increased its total budget for research from $778,100,000 in 1976 to $1,402,800,000 in 1987. *Id.* at E2290. In 1987 alone, $413,700,000 of NCI's total budget went for prevention. *Id.* In 1980 the NCI implemented an intervention research program designed to stop smokers from smoking and to keep nonsmokers from starting. *Id.* at E2291. The budget for this program has been increased from $13,000,000 in 1980 to about $32,000,000 in 1987. *Id.*

In spite of such programs and increases in cancer research funding, cancer deaths in America increased between 1980-1985. *Id.* at E2292. Between 1976 and 1985 there was an annual increase of 2.2% in mortality from lung and bronchus cancer, an overall increase of approximately 20%. *Id.* The NCI has concluded that

> [t]here is not in the United States an overall epidemic of cancer except for that attributable to cigarette smoking. Although it is clear that occupational carcinogens and community air pollutants do place individuals so exposed at increased risk for lung and other types of cancer, these risks are small compared to risks from other exposures. The major reason for the rising cancer incidence and mortality rate is tobacco usage.

Id. at E2296.

182. The estimated costs borne by businesses for the average smoker, including health insurance, fire losses, workers' compensation, absenteeism, productivity losses, and health difficulties for nonsmokers may be as high as $1000. Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL L. 317, 324 (1987).

183. *See supra* note 15 and accompanying text.

184. The tobacco industry is profitable and politically well connected. Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POLITICS, POL'Y & L., 277, 283 (1980).

Tobacco farming is buttressed by a federal price support program instituted in the 1930s. *Id.* at 281. This price support system operates on an allotment to holders which freezes tobacco growing; these allotments are essentially federal licenses to grow tobacco. *Id.* For a discussion of the allotment system and its affect on the tobacco industry, *see generally id.* at 281-82. The tobacco growing states have many incentives to be protective of their tobacco crops. *Id.* Each of the 537,000 allotments has a capital value and the economic health of a network of 150 market towns and 800 warehouses is dependent upon tobacco. *Id.* Although some tobacco is grown in eighteen states, the bulk of the production is concentrated in North Carolina, Kentucky, South Carolina, and Virginia. *Id.* at 280. Tobacco is not only important, it is vital for the economic livelihood of these states.

The political connections and skills of the tobacco firms seem to be excellent. *Id.* at 283. Each regulatory effort since the Surgeon General's first report on smoking has been converted to industry advantage. The firms hire the best legal counsel. *Id.* Their executives contribute to political campaigns. *Id.* Through their network of retailers, wholesalers, and advertising agencies, they keep in close touch with state and local politics. *Id.* The industry supports academic research on the health effects of cigarette smoking through the Counsel for Tobacco Research and for every study claiming to discover an ill effect due to smoking, the industry seeks to show that causality has not been established. *Id.* at 284.

The cigarette manufacturing business continues to prosper, with gross revenues approaching $16 billion. *Id.* However, just in case things do not work out favorably for cigarettes, the firms are diversifying. *Id.* Both federal and state governments profit from cigarette taxes which range from two cents to 21 cents per package. *Id.* at 285. Municipal and county governments also profit from cigarette taxes. *Id.* For additional information on the financial aspect of the tobacco industry, see *supra* note 178 and accompanying text. For a discussion of subsidies by the federal government to the tobacco industry, see Comment, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 320 (1987).

ers' Pollution), and many religious groups are successfully fighting cigarette smoking.[185] Moreover, public sentiment is forcing state and local government into taking action, some of which is dictating private and public worksite smoking policy.[186]

The decisive business manager with vision will not wait for others to make those decisions. A farsighted view of the current concern over the hazards of involuntary smoking presents an opportunity for a business to gain a substantial competitive advantage. That manager will recognize that smoking-related litigation and changing customs (brought about in part by new nonsmoking laws) will inevitably and dramatically affect the way business is conducted, and see that now is the time to prepare for it.

The main concerns a manager has are probably: (1) patrons — keeping old ones and gaining new ones; (2) an adequate pool of healthy, happy, and efficient employees; (3) cost containment; and (4) litigation avoidance. Regardless of the type of business or other activity, restrictions on smoking will work to the manager's advantage in each of these areas.[187] In other words, the *bottom line*,

---

185. Sapolsky, *The Political Obstacles to the Control of Cigarette Smoking in the United States*, 5 J. HEALTH POL'Y & L. 277, 286 (1986).

186. *See* Note, *supra* note 12, at 172 (twenty states limit smoking in the workplace).

187. *Patrons*: For most businesses and other places open to the public, smoking restrictions can only increase patronage. Smokers can and will refrain from smoking for the brief time it takes to conduct most transactions, so they will continue to be patrons of places which prohibit smoking. An increasing number of nonsmokers, however, will not go into buildings that are not smoke-free. For a time, at least, bars and some eating establishments may be exceptions. However, even these establishments will ultimately have to provide smoke-free accommodations for nonsmoking patrons and employees who want to work in a smoke-free workplace. Many have already started to do so.

Employees: Typically less than 30% of workers smoke. That number is decreasing. Studies show that a larger number of nonsmokers suffer from the effects of smoking than there are smokers. *See* THE BOTTOM LINE, *supra* note 69, at 55 ("over two-thirds of nonsmokers experience eye irritation, while one-third report headaches, nasal irritation, and cough when exposed to [ETS]"). So, if 30% of the workers are less healthy because they smoke, and at least another 46% (2/3 x 70%) are in various ways adversely affected by ETS, at least 76% of the nonsmokers in a workforce will be more healthy and more comfortable if smoking is eliminated. Moreover, no nonsmoker will refuse a job which prohibits smoking, and at least some smokers will quit smoking in order to qualify for these nonsmoker positions. More importantly, the pool of nonsmoker workers is at least twice as large as the pool of smoker workers. One would expect nonsmoker workers to gravitate toward the jobs that prohibit smoking, ultimately giving the entity which hires only nonsmokers a larger pool of applicants. One need only review the help wanted ads in any newspaper to find that some companies have already begun the practice of hiring only nonsmokers. *See* PHILLIP MORRIS MAGAZINE, Jan.-Feb. 1989, at 29:

> I am seeking a career change. Looking through the want ads of a major newspaper, I came across 17 ads that stated "non-smokers only need apply." This discrimination must stop. . . .
>
> . . .
>
> These fanatic, righteous, holier-than-thou non-smokers make me sick. I intend to do everything in my power to preserve the freedoms of smokers.

Id. at 29.

Cost containment: Smoker-related costs have been discussed throughout this article. It

whether measured in terms of profit or in terms of reduced cost of operation, will favor the nonsmoker entity over the smoker entity.

How quickly entities can become smoke-free will, of course, vary, depending upon a variety of factors.[188] Moreover, it would be inhumane, even if it is not illegal, to impose upon good workers, who happen to be addicted, a mandate that they stop smoking immediately or give up their positions; which is not to suggest that "on the job" smoking could not be curtailed immediately. Workplace smoking cessation programs should be implemented. For a time, at least, a designated smoking area with a separate ventilation system[189] could be considered.

In the final analysis, however, the prudent manager of a place open to the public will work toward a total ban of smoking on the premises. The goal should be a two-part policy: (1) a part for employees, which declares in essence "if you are going to work for us, it means no smoking any time or any place, period," and (2) a part for patrons, which in essence says "we appreciate your patronage, but our policy is no smoking on the premises. If you cannot accommodate us, we cannot afford the cost of your patronage."

---

follows that an entity that hires only nonsmokers will have a significant cost of operating advantage over its competitors which hire smokers.

Litigation avoidance: An entity which does not allow smokers on its premises or in its workforce need not be concerned about being sued because of a smoke-related issue. When courts hold that it may be cruel and unusual punishment to force a prisoner to inhale the smoke of another (*see* Avery v. Powell, 695 F. Supp. 632 (D.N.H. (1988)), those freeworld smokers who threaten suit to retain what they say is their right to blow smoke into the lungs of freeworld nonsmokers have little to threaten with. Their right to smoke, if in fact they have such a right, "ends where their behavior affects the health and well-being of others; furthermore, it is the smokers' responsibility to ensure that they do not expose nonsmokers to the potential effects of tobacco smoke." 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at xii.

188. *See generally* 1986 SURGEON GENERAL'S REPORT, *supra* note 2, at 261-334 (Chapter 6 (Policies Restricting Smoking in Public Places and the Workplace)).

189. Merely designating a smoking area in a building with a shared ventilation system does not solve the ETS problem. *See* Repace, *Passive Smoking Has No Place in the Workplace*, 133 CAN. MED. ASS'N J. 737 (1985):

> In a typical workplace, where . . . about one third of the workers are habitual smokers who smoke 32 cigarettes per day, the estimated carcinogenic risk to nonsmokers would be, depending upon the ventilation, 250 to 1000 times that considered acceptable for environmental carcinogens in air, water, or food. This risk cannot be reduced to an acceptable level by either ventilation or air cleaning. If smokers and nonsmokers are in different areas but those areas are served by the same ventilation system, as for example, in a large building, the background concentration of smoke circulated in the ventilation system might still be several times the acceptable risk level. Thus, the only practical way to reduce the risk of passive smoking to an acceptable level would be to separate the smokers and nonsmokers into areas with different ventilation systems or ban smoking in the workplace altogether.

Id. at 737-38.

CONCLUSION

In 1962, over 16 years ago, the then President of the United States, John F. Kennedy, approved the establishment of an expert committee to review available data on smoking and health.[190] The committee completed its work in 1964, concluding in a 387-page report to the Surgeon General that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[191] More than seven million lost lives later,[192] Congress' response has been to pass laws to protect the tobacco industry.[193] It has also continued to appropriate money with which to pay tobacco growers for growing tobacco.[194]

A cynic might suggest that the thirty-five billion dollar tobacco industry has purchased this congressional protectionism through its powerful lobby or that the system of power within Congress supports tobacco protectionism.[195] Whatever the reason,

---

190. 1964 SURGEON GENERAL'S REPORT, *supra* note 22, at 8.

191. *Id.* at 33.

192. Tobacco causes the premature deaths of 300,000 people a year. 1988 SURGEON GENERAL'S REPORT, *supra* note 15, at iii. Assuming the harmful effects of cigarette smoking have been known since the 1964 Surgeon General's Report first appeared, 300,000 tobacco related deaths have occurred each year for 24 years, for a total of over 7 million deaths related to tobacco use.

193. *See generally* Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1340 (1982). Good examples of protectionist legislation are the so-called "warnings" found in that Act, and the 1970 federal preemption amendment to 15 U.S.C. § 1334(b) ("No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarette the packages of which are labeled in conformity with the provisions of this chapter."). Other examples include excluding tobacco products from the jurisdictions of various agencies set up to protect consumers from dangerous products. Tobacco products are expressly excluded from the definitions of

> "hazardous substance" under the Federal Hazardous Substances Act, 15 U.S.C. § 1261(f)(2) (1982).
> "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2602(2)(B)(iii) (1982).
> "consumer product" under the Consumer Product Safety Act, 15 U.S.C. § 2052(a)(1)(B) (1982 & Supp. 1985).
> "consumer commodity" under the Fair Packaging and Labeling Act, 15 U.S.C. § 1459(a)(1) (1982).

194. Agriculture Price Support, 7 U.S.C. § 1445 (1982). Congress pays farmers to grow tobacco. Congress also supports legitimate farming, which explains in part why farm state congressional representatives help powerful tobacco growing state representatives protect tobacco.

195. *See* Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631 (1987):

> [T]he tobacco interests were [in 1962] well represented in Congress. Income from tobacco production was primarily centered in six southern states which operated under essentially one party political systems. These states were represented by congressmen and senators who were seldom challenged and thus had obtained greater seniority than their counterparts from two party states. Because committee chairmanships were awarded on the basis of seniority, the representatives from the six [tobacco growing] states held a disproportionate number of committee chairmanships, including seven of the twenty-one committees in the House and nearly one-fourth of those in the Senate.

congressional action and congressional inaction have given the tobacco industry a license to perpetuate the "big lie" (smoking is glamorous and harmless) which continues to lure millions of young people into an addiction trap that destroys their health and shortens their lives.[196]

Not all Americans buy this big lie. In fact, the great majority do not. Moreover, until recently freedom-loving Americans were content to let gullible smokers commit suicide.[197] That was until the national executive branch of the government, through its Surgeon General, told them that the big lie was killing them too. Now, the nonsmoking majority of Americans has made it clear that nonsmokers' freedoms must be valued as highly as are smokers' freedoms. In a very few years of action, nonsmokers have done what Congress has refused to do. They have dramatically curtailed public smoking. Through state and local legislation and in other ways, they have influenced public opinion against unrestricted smoking in public. The judiciary is responding as well. If the trends continue, it is probable that within the next few years all American public and private buildings open to the public, as well as all worksites, will be smoke-free.

The 1988 manager with vision will not wait for the government to impose restrictions. He or she will see that now is the time to put in place policies that eliminate ETS.[198] There is little to lose by doing so. Rather, by removing the substantial costs associated with ETS, there is a substantial competitive advantage to

---

Id. at 645. *See generally* Sapolsky, *supra* note 184, at 283 (as an example of tobacco companies' political connections, President Carter vacationed on a farm owned by the heir to the R.J. Reynolds fortune and Frank Saunders, the high ranking official in the R.J. Reynolds Company who was Carter's liason to the business community).

196. The lie is communicated with the help of $2 billion a year ($228,000 per hour) advertising budget. *Media Advertising for Tobacco Products*, J. AM. MED. ASS'N, Feb. 29, 1986, at 1033. The advertising is aimed primarily at the young, and promises glamour, acceptance, happiness, adventure, and pleasure, all coming from a white paper wrapped weed not much larger than a coffin nail. What it delivers is a harmful drug addiction, the prospect of one or more dreaded diseases, and a shortened life span.

197. After all, many millions of Americans daily show disregard for their own health and safety. Some overeat, while others undereat. Many eat unhealthy foods. Most underexercise, while some overexercise or take drugs to enhance exercise. Alcohol abuse is rampant. Helmets hang from seats of speeding motorcycles. Seat belts stay crumpled under car seats. At any given time there are people hanging perilously from the sides of mountains, throwing themselves out of airplanes, hurdling down ski slopes or over white water rapids, boxing other people's heads and having their own boxed, and on and on goes the list. But, as someone once said, "if you are careful enough, nothing bad or good will ever happen to you." Boswell, *The Life of Johnson* (GBWW, p. 315) ("but if possibility of evil to be exclude good, no good ever can be done. If nothing is to be attempted in which there is danger, we must all sink into hopeless inactivity").

198. Some bars, restaurants, and gaming establishments might have to phase out ETS rather than simply eliminate it immediately. Every museum, library, manufacturing plant, retail establishment, school, office building, or common carrier should do it today.

gain. Moreover, it is the right thing to do. Restricting smokers' opportunity to smoke will encourage many to quit. More importantly, the assault on nonsmokers' lungs must be stopped.